



Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Report

Vulnerable Witnesses in Civil Proceedings

NILC 10 (2011)

REPORT

VULNERABLE WITNESSES IN CIVIL PROCEEDINGS

NILC 10 (2011)

Laid before the Northern Ireland Assembly by the Department of Justice under section 52(2) of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 10 of Schedule 13 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010)

JULY 2011

The text of this document (this excludes, where present, the Royal Arms and all departmental and agency logos) may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not in a misleading context.

The material must be acknowledged as Northern Ireland Law Commission copyright and the document title specified. Where third party material has been identified, permission from the respective copyright holder must be sought.

This publication is also available on our website at www.nilawcommission.gov.uk

Any enquiries regarding this publication should be sent to us at:

Northern Ireland Law Commission
Linum Chambers
2 Bedford Square
Bedford Street
Belfast
BT2 7ES

ISBN 9780337097379

Printed in the UK by The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office

PC2968

06/11

**This document may be made available in an alternative format or language.
Please contact us to discuss how we can best provide a copy of this report that
meets your needs.**

NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission (“the Commission”) was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of the law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission. If the programme includes the examination of any branch of law or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter, the Department of Justice must consult the Secretary of State for Northern Ireland before approving that programme.

MEMBERSHIP

The Commission consists of a Chairman, who must hold the office of a judge of the High Court, and four commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive.

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
Commissioner:	Dr Venkat Iyer (Law Academic)
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor

Legal Staff

Katie Quinn LLB, MSc
Imelda McAuley LLB, LLM
Clare Irvine LLB, Solicitor

Legal Researchers

Rebecca Ellis LLB, Solicitor
Nicola Smith BA (Int), LLB, LLM
Patricia MacBride BA, JD, Attorney-at-law
Catherine O'Dwyer BA, MA, PhD

Administration Staff

Business Manager: Derek Noble

Communications &
HR Manager: Cathy Lundy

Personal Secretary to
the Chairman and
Chief Executive: Paula Martin

Administrative
Officers: Joanne Kirk
Andrew McIlwrath

The Commissioner in charge of this project is Dr Venkat Iyer.

The legal team for this project is:

Project lawyer:	Clare Irvine LLB, Solicitor
Legal Researchers:	Lisa McKibben BSc, MSc (November 2008 – August 2009) Nicola Smith BA (Int), LLB, LLM (From December 2009)
Legislative drafting Consultant:	Ronan Cormacain LLB, LLM, BL.

THE NORTHERN IRELAND LAW COMMISSION

REPORT

VULNERABLE WITNESSES IN CIVIL PROCEEDINGS

CONTENTS

	Paragraph	Page
FOREWORD		viii
GLOSSARY OF LEGISLATION		xi
GLOSSARY OF TERMS		xiii
EXECUTIVE SUMMARY		xiv
CHAPTER 1. INTRODUCTION		1
CONSULTATION	1.1	1
BACKGROUND TO THE PROJECT	1.3	1
DEPARTURES FROM THE PRINCIPLE OF ORALITY IN CRIMINAL PROCEEDINGS	1.5	2
Special measures	1.6	3
Who can use special measures?	1.9	4
What special measures are available to witnesses?	1.10	4
DEPARTURES FROM THE PRINCIPLE OF ORALITY IN CIVIL PROCEEDINGS	1.12	5
SCOPE OF THE PROJECT	1.14	6
DOES THE CURRENT LAW AND PRACTICE NEED TO BE REFORMED?	1.15	6
The need for special measures in civil proceedings	1.19	8
The Commission's view	1.21	9
FURTHER ISSUES TO BE CONSIDERED	1.23	10
Practical considerations	1.24	10
Identifying witnesses who are eligible for special measures	1.25	10
CHAPTER 2. ELIGIBILITY FOR SPECIAL MEASURES		13

WHO SHOULD BE ELIGIBLE FOR PROTECTION?	2.2	13
DETERMINING ELIGIBILITY	2.5	14
The criminal model in Northern Ireland, Scotland and England and Wales	2.6	14
The New Zealand model	2.11	17
CHILD WITNESSES	2.15	18
The consultation response	2.16	18
Issues to be considered	2.17	19
Upper age limit	2.18	19
Automatic protection?	2.21	20
Opting out	2.25	22
Parental views	2.32	24
Recommendation	2.34	25
Social and cultural background	2.35	26
MENTAL DISORDER OR SIGNIFICANT IMPAIRMENT OF INTELLIGENCE AND SOCIAL FUNCTIONING	2.36	27
Court experiences	2.37	27
Consultation response	2.38	28
Definition of “mental disorder”	2.41	29
Recommendation	2.44	31
PHYSICAL DISABILITY OR DISORDER	2.45	31
FEAR OR DISTRESS IN CONNECTION WITH GIVING EVIDENCE	2.50	33
Factors which may contribute to fear or distress	2.51	34
Consultation response on the Scottish factors	2.54	36
Other factors	2.56	37
Recommendation	2.57	37
Other considerations for the court to take into account	2.58	38
OTHER ELIGIBILITY CRITERIA FOR SPECIAL MEASURES		38
Linguistic or cultural background	2.59	38
Other suggestions made by consultees	2.60	39
CHAPTER 3. TYPES OF MEASURE		41
INTRODUCTION	3.1	41
SCREENING	3.2	41
EVIDENCE GIVEN IN PRIVATE	3.6	42
THE REMOVAL OF WIGS AND GOWNS	3.11	44
VIDEO-RECORDED EVIDENCE-IN-CHIEF	3.14	45
<i>W (Children)</i>	3.22	49
Recommendation	3.30	51

LIVE TELEVISION LINK	3.31	53
Consultation response	3.34	54
Cost and functionality	3.38	56
Recommendation	3.40	57
VIDEO-RECORDED CROSS-EXAMINATION AND RE-EXAMINATION	3.41	57
USE OF INTERMEDIARIES	3.44	58
AIDS TO COMMUNICATION	3.53	62
SUPPORTERS AND OTHER MEASURES	3.57	63
Other measures	3.63	66
CHAPTER 4. RELATED ISSUES		67
WITNESS ANONYMITY	4.2	67
<i>R v Davis</i>	4.5	68
COMPETENCE OF WITNESSES IN CIVIL PROCEEDINGS	4.15	72
The law in Scotland	4.19	73
Reform?	4.20	74
Sworn or unsworn evidence	4.27	77
CHAPTER 5. SUMMARY OF RECOMMENDATIONS		79
CHAPTER 6. EQUALITY SCREENING		82
CHAPTER 7. REGULATORY IMPACT ASSESSMENT		101
DRAFT BILL		107
EXPLANATORY AND FINANCIAL MEMORANDUM		127
LIST OF CONSULTEES WHO PROVIDED RESPONSES TO THE CONSULTATION PAPER		133

FOREWORD

As Chairman of the Northern Ireland Law Commission, it is my pleasure to present this landmark report to the government and public of Northern Ireland.

These are indeed exciting times for the Northern Ireland Law Commission (*“the Commission”*). In December 2010, the Commission presented to Government its first report: Land Law Reform, whilst in March 2011 a report concerning the law relating to business tenancies was published. Just some weeks later, the Commission finds itself presenting another substantial report to those who govern us. This may not represent a flood or, indeed, a stream but it is most certainly a steady trickle!

In his landmark treatise, Lord Bingham, reflecting on the principle of the rule of law, stated:

*“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future **and publicly administered in the courts**”.*¹

This is the principle which guides and dominates all that the Commission undertakes. I have highlighted the latter part of Lord Bingham’s formulation, as it is especially apposite in the context of this report.

The Northern Ireland Law Commission is established and governed by the Justice (Northern Ireland) Act 2002. Its creation represents one of the important recent reforms in the constitutional legal order of this jurisdiction. The Law Commission’s overarching statutory duty is to keep under review the law of Northern Ireland with a view to its systematic development and reform. This entails formulating proposals for the simplification and modernisation of the laws of this country.

Fundamentally, when seeking the approval of the Minister of Justice for the contents of its Law Reform programmes from time to time, the Commission, applying its project selection criteria, seeks to identify those fields of law where there is a clear need for reform which will bring about consequential benefits to substantial sections of the community. These prefatory words apply with full vigour to this report, which is the

¹ Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010), p8.

product of an extensive exercise in which the Commission has researched and reviewed the law and practice relating to vulnerable witnesses in civil proceedings.

It is a truism of some longevity that every civilised society is measured according to how it treats its weaker and less advantaged members. It is probably correct to say that most members of society do not have to attend a court at any stage of their lifetime, much less give evidence in any form of legal proceedings. Almost seventy years ago, an Italian author described courtrooms as “*grey hospitals of human corruption*”.² Further, Lord Bingham has observed:

*“Few would choose to set foot in a court at any
time in their lives if they could avoid it ...”*³

Those on whom this burden and challenge fall constitute a relatively small minority of the population. Within this small minority, there is a significant percentage of witnesses who, by virtue of their youth, emotional or physical wellbeing or some other factor are vulnerable. We are governed by a legal system in which sworn oral testimony dominates. This is the mechanism whereby the court seeks out the truth, it being the primary task of most courts to establish the facts upon which their decisions are to be based. Accordingly, it would be plainly inimical to the rule of law if the truth does not emerge and, therefore, the material facts are not established as a result of witnesses being afflicted by fear, intimidation or some emotional or physical incapacity. Justice would be threatened and injustice would flourish.

In compiling this report, the Commission has sought to address the identified mischiefs and deficiencies in the current law as imaginatively and thoroughly as possible, giving effect to its statutory duty to simplify and modernise the law. We believe that this report and accompanying draft legislation provide a vehicle whereby these aims can be achieved in a fair, proportionate, realistic and efficient manner. The sweep of this project is extensive: it examines in some depth the principle of orality; the reforms which have been introduced in criminal proceedings, particularly through the mechanism of special measures; exceptions to the principle of orality; the law and practice in other jurisdictions; the criteria which should govern the identification of witnesses qualifying for special treatment; the type of special measures which would be appropriate in civil proceedings; and the challenging issue of witness anonymity.

² Piero Calamandrei, *A Eulogy of Judges* (Clark, NJ: Lawbook Exchange Ltd, 2011)

³ Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010), p9.

The law reform proposals contained in this report and reflected in the accompanying draft legislation are the product of an extensive and robust consultation exercise. The Law Commission has taken steps to ensure that all potentially interested and affected citizens, groups, organisations and professions have had the opportunity to ventilate their views and suggestions and, hence, influence the shape and content of this report. This should provide significant reassurance to the local legislators who will make final decisions. Throughout the process culminating in this report, care has been taken to ensure that the executive has been periodically informed of the progress of the project, its evolving orientation and its possible outcomes. Thus the report will not take legislators by surprise.

Credit and appreciation are due to those who can proudly claim responsibility for the compilation of this report and its accompanying draft legislation. They are Dr. Venkat Iyer, the Law Commissioner concerned; Clare Irvine, the senior project lawyer; and Nicola Smith and Lisa McKibben, the legal researchers. It has been my pleasure to interact periodically with this highly committed and skilled team and I congratulate them unreservedly. They can justifiably take pride in the significant contribution which they have made to law reform in Northern Ireland.

Finally, I strongly commend this report to Government. The report is blessed with the strengths, virtues and qualities already highlighted. It is further enhanced by the accompanying draft legislation, consisting of a comprehensive and modern statutory model. The process of law reform in Northern Ireland will be barren indeed if reports of this nature do not culminate in legislation. The thorough and comprehensive process preceding this report should ensure that there will be no good reason for failing to legislate in its wake. The Law Commission looks forward to seeing the ensuing draft legislation on the agenda of the Executive Committee and the Northern Ireland Assembly in the very near future. The population of this country awaits, and deserves, the legislation which we earnestly recommend to Government.

The Honourable Mr Justice Bernard McCloskey
Chairman
Northern Ireland Law Commission

GLOSSARY OF LEGISLATION

Northern Ireland

Adoption (Northern Ireland) Order 1987 (SI 1987/2203 (NI 22))
Anti-social Behaviour (Northern Ireland) Order 2004 (SI 2004/1988 (NI 12))
Children and Young Persons Act (Northern Ireland) 1968 (c. 34)
Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2))
Children's Evidence (Northern Ireland) Order 1995 (SI 1995/757 (NI 3))
Civil Evidence (Northern Ireland) Order 1997 (SI 1997/2983 (NI 21))
County Courts (Northern Ireland) Order 1980 (SI 1980/397 (NI 3))
Criminal Evidence (Northern Ireland) Order 1999 (SI 1999/2789 (NI 8))
Criminal Justice (Children) (Northern Ireland) Order 1998 (SI 1998/1504 (NI 9))
Criminal Justice (Evidence) (Northern Ireland) Order 2004 (SI 2004/1501 (NI 10))
Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (SI 1988/1847 (NI 17))
Criminal Justice (Northern Ireland) Order 1994 (SI 1994/2795 (NI 15))
Criminal Justice (Northern Ireland) Order 2005 (SI 2005/1965 (NI 15))
Disability Discrimination Act 1995 (c. 50)
Domestic Proceedings (Northern Ireland) Order 1980 (SI 1980/563 (NI 5))
Enduring Powers of Attorney (Northern Ireland) Order 1987 (SI 1987/1627 (NI 16))
Evidence Act 1851 (c. 99)
Family Homes and Domestic Violence (Northern Ireland) Order 1998 (SI 1998/1071 (NI 6))
Family Law (Northern Ireland) Order 1993 (SI 1993/1576 (NI 6))
Fines and Penalties (Northern Ireland) Order 1984 (SI 1984/703 (NI 3))
Judicature (Northern Ireland) Act 1978 (c. 23)
Justice Act (Northern Ireland) 2011 (c.24)
Justice (Northern Ireland) Act 2002 (c. 26)
Mental Health (Northern Ireland) Order 1986 (SI 1986/595 (NI 4))
Northern Ireland Act 1998 (c. 47)
Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1999/1341 (NI 12))
Race Relations (Northern Ireland) Order 1997 (SI 1997/869 (NI 6))

England and Wales

Children Act 2004 (c. 31)
Children, Schools and Families Act 2010 (c. 26)
Coroners and Justice Act 2009 (c. 25)

Criminal Evidence (Witness Anonymity) Act 2008 (c. 15)

Equality Act 2010 (c. 15)

Inquiries Act 2005 (c. 12)

Lunacy Act 1845 (8 & 9 Vict., c.100)

Mental Health Act 1983 (c. 20)

Mental Health Act 2007 (c. 12)

Youth Justice and Criminal Evidence Act 1999 (c. 23)

Scotland

Criminal Procedure (Scotland) Act 1995 (c. 46)

Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

Vulnerable Witnesses (Scotland) Act 2004 (asp 3)

New Zealand

Evidence Act 2006 (No. 69)

GLOSSARY OF TERMS

Child	In this paper, the term “child” is used because it is the term adopted by legislation in this field, however, it should be read as including “young people”.
Cross-examination	The process of questioning by a party or his representatives which enables the evidence of a witness called by another party to be tested.
Examination-in-chief	The process by which evidence is obtained from a witness by his own legal representatives.
Hearsay	A statement, made otherwise than by a person while giving oral evidence in court, which is given as evidence of the truth of its contents.
Indictable offence	A criminal offence which is dealt with by the Crown Court.
Re-examination	The process by which a witness can explain or contradict any false impressions which have arisen as a result of cross-examination.
Summary offence	A criminal offence which is dealt with by the Magistrates’ courts.

EXECUTIVE SUMMARY

CHAPTER 1

The principle of orality states that witnesses are required to give their evidence in proceedings orally, in person and before a forum (the court) which is open to the public.

A number of departures have been made from the principle of orality in order to offer protection to certain witnesses who may experience particular difficulties giving evidence in court. The most significant departures have taken place in the criminal law, with “special measures” being made available to children; witnesses with a mental disorder or a significant impairment of intelligence and social functioning, a physical disability or disorder; and those who are suffering fear and distress in connection with giving their evidence to the court. Special measures, such as the use of screens and live television link, offer protection to eligible witnesses, allowing them to give their best evidence to the court.

In Chapter 1, the Commission explains the principle of orality and its importance in both the criminal and civil law. The Commission also describes the evolution of the departures from the principle in the criminal law, identifying how the protections which were acknowledged as necessary for child witnesses were extended to certain adults, with the eventual creation of special measures. In this Chapter, the Commission identifies recent legislative amendments in the criminal law which affect special measures. The Commission also details the consultation process which it undertook and analyses the responses of consultees on a number of issues, including whether the law and practice in Northern Ireland for witnesses in civil proceedings is adequate, or whether a more radical departure, such as the one taken in the criminal law, is required to offer protection to witnesses. The Commission makes certain recommendations in relation to these issues, including that a legislative scheme providing for special measures for certain witness in civil proceedings should be put in place.

CHAPTER 2

In Chapter two, the Commission describes the options for determining which witnesses should be eligible for special measures in civil proceedings, with particular reference to the criminal scheme which currently exists in Northern Ireland and England and Wales and the position in Scotland and New Zealand. The views of consultees are discussed and analysed and recommendations are made. Specifically, the Commission

recommends that the criminal scheme which currently exists in Northern Ireland is a good model on which to base a similar scheme for civil proceedings, albeit with a few minor modifications.

CHAPTER 3

In Chapter 3, the Commission considers the types of special measure which would be appropriate for witnesses who are required to give evidence in civil proceedings. The merits and difficulties of each special measure are discussed, together the views of consultees. Recommendations are made in relation to which special measures the Commission considers to be of benefit to eligible witnesses in civil proceedings. It is considered that live television link, the use of screens, removal of wigs and gowns, the use of intermediaries and aids to communication should be provided for in any statutory scheme, with special provision being made for the use of video-recorded evidence in proceedings under the Children (Northern Ireland) Order 1995.

CHAPTER 4

Chapter 4 contains a consideration of issues which are related to witnesses giving evidence in civil proceedings. These issues are witness anonymity and the competence of witnesses to give evidence in civil proceedings.

Witness anonymity is a controversial form of protection for witnesses. The criminal law has recently undergone significant change, following a House of Lords judgment. The Commission considers the issue of witness anonymity in the civil law, discusses the views received from consultees and identifies a number of options for addressing the issues which have been identified. The Commission has decided not to make any recommendations for reform of this area at this time.

The Commission also considers the issue of competence of witnesses to give evidence in civil proceedings. Putting in place special provision to assist and encourage certain witnesses to give evidence does not sit well with provisions which may then exclude them for lacking competence to give evidence. The Commission explores the options taken in the criminal law in Northern Ireland and in civil proceedings in Scotland, discusses the views of consultees and makes recommendations for reform of the law in this area.

CHAPTER 5

Chapter 5 contains a summary of recommendations made by the Commission which are contained in this report.

CHAPTER 6

Chapter 6 contains an Equality Screening of the Commission's recommendations.

CHAPTER 7

Chapter 7 contains a Regulatory Impact Assessment of the Commission's recommendations.

A draft Bill and accompanying Explanatory and Financial Memorandum are also contained in this report.

CHAPTER 1. INTRODUCTION

CONSULTATION

- 1.1 This project was chosen by the Northern Ireland Law Commission (“the Commission”) as part of its First Programme of Law Reform. Consultation with key stakeholders and other interested parties has formed an important part of the project. Pre-consultation took place at a number of events which were held throughout Northern Ireland during 2009, namely in Belfast, Londonderry and Dungannon. On 1st April 2010, the Commission published a consultation paper¹ which invited responses and representations from all interested individuals, organisations and professions. During the three month consultation period, the Commission also met with a number of groups and organisations, namely Include Youth, the National Children’s Bureau and the National Society for the Prevention of Cruelty to Children. Include Youth (Young Voices Programme) also arranged three consultation meetings with the Young Offenders Centre at Hydebank Wood in Belfast, a community group and the Juvenile Justice Centre at Woodlands in Bangor and the outcomes of these meetings were reported to the Commission.
- 1.2 The Commission was gratified to receive a number of insightful and detailed consultation responses from consultees which have assisted it greatly in its deliberations. A full list of consultees who responded to the consultation paper is included at the back of this Report. The Commission would like to extend its thanks to each and every individual and organisation who took the time to respond to the consultation process. In particular, the Commission would like to thank the young people who participated in the consultation and the organisations which supported them while they made their contribution.

BACKGROUND TO THE PROJECT

- 1.3 Witnesses in both civil and criminal proceedings have traditionally been expected to give their evidence in person before the public forum of the court. This is known as the “principle of orality”. This principle has been a cornerstone of the trial process as it helps to ensure that a person accused of a crime, or a party involved in civil proceedings, is given a fair hearing: a right enshrined in

¹ Northern Ireland Law Commission, *Vulnerable Witnesses in Civil Proceedings* (NILC 4 (2010)).

Article 6 of the European Convention on Human Rights. The principle of orality helps to achieve fairness by requiring that witnesses are seen to give their evidence openly in court, allowing that evidence to be tested. The witness's reactions to the testing can then be examined by a judge or jury for the purposes of assessing his credibility and reliability, which in turn allows the truth to be determined.

- 1.4 The principle of orality has been modified to some degree by various interventions in both criminal and civil proceedings. In criminal proceedings, these interventions or departures from the principle of orality seek to offer protection to various types of witness when they are giving evidence before the courts. There appear to be two main justifications for these departures in criminal law. First, there is a recognition that some witnesses, such as children² and adults living with mental disorders or learning disabilities and those experiencing physical disabilities or disorders, have specific needs which must be met to allow them to give their best evidence in court. Second, there is also a recognition that there is a need to protect witnesses from intimidation connected with giving evidence in criminal proceedings.³

DEPARTURES FROM THE PRINCIPLE OF ORALITY IN CRIMINAL PROCEEDINGS

- 1.5 In criminal proceedings, there have been a number of departures from the principle of orality. Chapter 2 of the consultation paper describes the variety of departures which have taken place in relation to witnesses who are required to give evidence in criminal proceedings, including statements in writing in relation to the evidence of children,⁴ the power to clear the court when children are giving their evidence⁵ and the use of “special measures” under the Criminal Evidence (Northern Ireland) Order 1999.

² See consultation paper paragraphs 1.4 – 1.8 for discussion of the evolution of protections for child witnesses in criminal proceedings.

³ See consultation paper paragraphs 1.9 – 1.13 for discussion in relation to the background to developments regarding protections against witness intimidation.

⁴ Originally implemented by section 58 of the Children and Young Persons Act (Northern Ireland) 1968 which was amended by Article 12 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 and eventually replaced by Article 23 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

⁵ Article 21 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

Special measures

- 1.6 In criminal proceedings in Northern Ireland, special measures are methods of giving evidence which move away from the traditional mode of giving oral evidence in person, in a courtroom. Their development can be traced back to a commitment which was contained in the Labour Party's election manifesto in 1997, which promised that:

Greater protection will be provided for victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses.⁶

- 1.7 This manifesto commitment was taken forward by the Labour government in *Speaking Up for Justice*,⁷ a report of a working group which had been set up to consider the issue. In this report, it was acknowledged that some individuals, such as children, adults living with a mental disorder or significant impairment of intelligence or social functioning, adults with a physical disability or disorder, and people who are suffering fear and distress because they have to give evidence, experience particular difficulties whilst giving evidence in court. These difficulties may discourage these individuals from participating in the court proceedings, or may result in the court failing to hear their "best evidence". In order to assist these individuals to attend court and give their best evidence, the report made innovative recommendations which detailed how protections for these witnesses could be introduced into the criminal (and civil) justice system. Amongst these recommendations was the use of special measures.
- 1.8 In relation to criminal proceedings, the recommendations contained in *Speaking Up for Justice* were taken forward into legislation in England and Wales by the enactment of the Youth Justice and Criminal Evidence Act 1999. In Northern Ireland, the recommendations were given effect by the Criminal Evidence (Northern Ireland) Order 1999. The recommendations contained in *Speaking Up for Justice* in relation to protections for witnesses in civil proceedings have not been taken forward in either jurisdiction to date.

⁶ www.labour-party.org.uk/manifestos/1997.

⁷ Home Office, *Speaking Up for Justice Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London: Home Office, June 1998).

Who can use special measures?

- 1.9 There are a number of categories of witness who are eligible for special measures: children;⁸ people living with a mental illness or learning disability;⁹ those living with a physical disability or disorder;¹⁰ and witnesses whose fear and distress in connection with giving evidence may diminish the quality of their evidence.¹¹

What special measures are available to witnesses?

- 1.10 Children, those living with a mental illness or learning disability and people experiencing a physical disability or disorder are eligible for a variety of special measures, namely:
- giving evidence from behind a screen;¹²
 - giving evidence by live television link;¹³
 - giving evidence in private;¹⁴
 - the removal of wigs and gowns by the presiding judge and barristers;¹⁵
 - using pre-recorded evidence-in-chief;¹⁶
 - using video-recorded cross-examination or re-examination;¹⁷
 - use of an intermediary;¹⁸ and
 - use of aids to communication.¹⁹
- 1.11 Witnesses whose evidence will be diminished because they are suffering from fear and distress in connection with giving evidence in court are eligible for the above-mentioned special measures too, save for intermediaries and aids to communication.

⁸ Article 4(1)(a) of the Criminal Evidence (Northern Ireland) Order 1999.

⁹ Article 4(2)(a) of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁰ Article 4(2)(b) of the Criminal Evidence (Northern Ireland) Order 1999.

¹¹ Article 5(1) of the Criminal Evidence (Northern Ireland) Order 1999.

¹² Article 11 of the Criminal Evidence (Northern Ireland) Order 1999.

¹³ Article 12 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁴ Article 13 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁵ Article 14 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁶ Article 15 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁷ Article 16 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁸ Article 17 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁹ Article 18 of the Criminal Evidence (Northern Ireland) Order 1999.

DEPARTURES FROM THE PRINCIPLE OF ORALITY IN CIVIL PROCEEDINGS

- 1.12 In the consultation paper, the Commission examined the departures from the principle of orality which have already taken place in civil proceedings in Northern Ireland.²⁰ There have been a number of legislative departures and also those which have taken place as a result of Court Rules and the exercise of the inherent jurisdiction of the court. For example, the Civil Evidence (Northern Ireland) Order 1997 allows a court to admit hearsay evidence, whilst Article 6 of the Criminal Justice (Northern Ireland) Order 2005 (which inserts Article 6C into the Anti-social Behaviour (Northern Ireland) Order 2004) allows the special measures which are available by virtue of the Criminal Evidence (Northern Ireland) Order 1999 to be available to witnesses in proceedings to apply for, vary or discharge an anti-social behaviour order.²¹ Court Rules, made to determine the practice and procedure in courts, have been made in relation to a number of tiers of court in Northern Ireland. The Rules of the Court of Judicature of Northern Ireland²² make provision for evidence in some proceedings to be given by affidavit in certain circumstances,²³ by statement on oath and by live television link, telephone or other method of direct communication²⁴ or by deposition.²⁵
- 1.13 By virtue of Order 32, rule 17, civil proceedings can also be heard *in camera*, that is to say, in private if “publicity may defeat justice”. County Court Rules²⁶ also make provision for giving evidence by affidavit,²⁷ deposition²⁸ or in private.²⁹ Similarly, there are provisions in the Family Proceedings Rules (Northern Ireland) 1996³⁰ which permit the use of affidavit evidence³¹ and live television link or any other method of direct communication³² in family proceedings.³³ Live television link and other direct methods of giving evidence

²⁰ See consultation paper paragraphs 3.1 – 3.24.

²¹ The provisions of the Criminal Evidence (Northern Ireland) Order 1999 are amended slightly to take account of the differences which exist between the civil and criminal systems.

²² Made under section 55 of the Judicature Act 1978.

²³ Order 38, rule 2(1) see consultation paper paragraph 3.7 for further discussion.

²⁴ Order 38, rule 3(2)(e) see consultation paper paragraph 3.8.

²⁵ Order 39, rules 1-3 see consultation paper paragraph 3.9.

²⁶ Made under Article 48 of the County Courts (Northern Ireland) Order 1980.

²⁷ Order 24, rule (2)(1) see consultation paper paragraphs 3.11 – 3.12.

²⁸ Order 24, rule 20(1) see consultation paper paragraph 3.13.

²⁹ Order 16, rule 1 see consultation paper paragraph 3.15.

³⁰ S.R. 1996 No. 322.

³¹ Rule 2.41.

³² Rule 7.8A.

³³ “Family proceedings” are defined by Article 12 of the Family Law (Northern Ireland) Order 1993 as proceedings which are family business and any corresponding proceedings in a county court. “Family business” is further defined as meaning business assigned to the Family Division

are also available to witnesses who are required to give evidence in Magistrates' Courts in relation to family law matters.³⁴ Where the courts' inherent jurisdiction is concerned, this has been extended to permit various departures from the principle of orality, including the use of screens,³⁵ excluding parties and witnesses from the courtroom³⁶ and dispensing with the wearing of wigs and gowns.³⁷

SCOPE OF THE PROJECT

- 1.14 The scope of this project has been to determine whether the current departures from the principle of orality in civil proceedings are enough to offer proper protection to vulnerable witnesses, or whether further protections are required. In particular, the consultation paper³⁸ considered the issue of whether a more co-ordinated, consistent and accessible regime which offers protection to witnesses when they are giving evidence, such as the one which creates special measures to assist witnesses when giving evidence in criminal proceedings,³⁹ should be made available in civil proceedings.

DOES THE CURRENT LAW AND PRACTICE NEED TO BE REFORMED?

- 1.15 In the consultation paper, the Commission asked consultees whether they considered that the departures from the principle of orality which had already taken place in relation to civil proceedings were enough to provide the necessary protection for witnesses. The Commission had suggested that it appeared that the current law and practice in Northern Ireland gave limited protection to witnesses who may experience difficulties in giving oral evidence in civil proceedings. It also noted that the protections have not evolved as a result of a coherent and considered plan to address the difficulties of witnesses

of the High Court and no other Division except for certain matters in relation to the estates of deceased persons and proceedings under Part VIII of the Mental Health (Northern Ireland) Order 1986 and proceedings under the Enduring Powers of Attorney (Northern Ireland) Order 1987.

³⁴ Rule 15A of the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996 (S.R. 1996 No. 324) govern proceedings under the Domestic Proceedings (Northern Ireland) Order 1980, whilst rule 18A of the Magistrates' Courts (Children) (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996 (S.R. 1996 No. 323) relates to proceedings under the Children (Northern Ireland) Order 1995.

³⁵ *R v W* [2003] 1 FLR 329.

³⁶ John Spencer and Rhonda Flin, *The Evidence of Children: the Law and Psychology* (Oxford: Blackstone Press, 2nd ed 1993) p111.

³⁷ Practice Direction 4 of 2006 (11 May 2006). See consultation paper paragraph 3.23 for further discussion.

³⁸ See paragraphs 3.25 to 3.27 of the consultation paper.

³⁹ By virtue of the Criminal Evidence (Northern Ireland) Order 1999.

and many depend upon the discretion of the court. The Commission expressed the view that this results in a system which is not particularly accessible or understandable to court users and one which has not, to date, evolved to make adequate provision for witnesses.⁴⁰

1.16 All but one of the consultees who responded to the consultation paper agreed that special measures should be made available in civil proceedings in Northern Ireland. Comments were very positive about the proposals, with one consultee stating that there appeared to be no justification for confining the use of special measures to witnesses in criminal cases only. Another consultee commented that the implementation of such measures would enhance compliance with obligations under section 75 of the Northern Ireland Act 1998⁴¹ as practitioners would be increasingly exposed to the issues relating to the groups specified in that legislation. One consultee suggested that there was a strong case for reforming the protection currently offered to witnesses in civil proceedings as the current law and practice only offers limited safeguards for those witnesses who may experience difficulty in giving oral evidence in court. Supporting this view, another consultee argued that the implementation of effective and appropriate special measures for people living with a disability is an important means of meeting the UK's obligations on access to justice under Article 13 of the UN Convention on the Rights of Persons with Disabilities. One consultee who met the Commission in a face to face meeting expressed "whole-hearted support" for the Commission's proposed approach to witnesses in civil proceedings who may experience difficulties when giving evidence. This consultee believed that special measures were likely to be helpful and represented a further chance to protect children.

1.17 The groups of young people who met with the Commission to discuss the issues contained in the consultation paper also supported the introduction of special measures for certain witnesses in civil proceedings. Some consultees considered that the stresses of the evidence-giving process in civil cases were

⁴⁰ For example, the current law and practice has not addressed substantive issues such as the types or categories of witness who can apply to the court to give evidence in an alternative method to oral testimony, nor are the circumstances in which such an application can be made particularly apparent.

⁴¹ Section 75 of the Northern Ireland Act 1998 places a duty on public authorities when carrying out their functions to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women, between persons with or without a disability and between persons with or without dependants. It also places a duty on public authorities when carrying out their functions to have regard to the desirability to promote good relations between persons of different religious belief, political opinion or racial group.

similar to those experienced by witnesses in criminal proceedings, whilst a number of individuals were concerned that witnesses may be subject to intimidation if they had to give evidence in civil proceedings against someone who is a member of a paramilitary organisation. A number of the young people in the groups had direct experience of using special measures in the criminal context and reported that they had found them useful. They favourably compared the process of giving evidence in these proceedings with their experience in courts which had dealt with their care proceedings or proceedings in relation to contact and residence issues under the Children (Northern Ireland) Order 1995. The outcome of the group meetings which were arranged by Include Youth (Young Voices Programme) with the Juvenile Justice Centre and the Young Offenders Centre also indicated that consultees involved in this process were supportive of the introduction of special measures.

- 1.18 There was only one consultee who expressed concern about the introduction of special measures in civil proceedings. This concern was voiced in the belief that civil courts were generally run in such a way that the needs of witnesses were fully understood and taken into account. The Commission appreciates that there are many examples of excellent practice in Northern Ireland courts amongst the judiciary and legal representatives, but considers that a clear statutory scheme could only enhance this existing good practice.

The need for special measures in civil proceedings

- 1.19 It is difficult to assess how many people may wish to avail of special measures in civil proceedings. However, court statistics do give an indication of the numbers of court users who might wish to seek to use protective measures when giving evidence in court. For instance, the Northern Ireland Court Service Customer Exit Survey 2007/2008 reports that 7.5% of court users consider that they fall within the definition of “disability” which is contained in the Disability Discrimination Act 1995,⁴² whilst 8.1% of users of family courts feel that they fall within this definition. The Customer Service Exit Survey 2009 shows that 7.5% of civil court users considered that they met the 1995 Act definition. More general statistics published by the Northern Ireland Statistics and Research

⁴² A person has a disability for the purposes of the 1995 Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Agency⁴³ reveal that in 2006/07, 18% of all people living in Northern Ireland experienced some degree of disability, whilst 21% of adults and 6% of children in Northern Ireland were disabled.

- 1.20 Statistics also give an indication of the numbers of certain types of cases in which it is likely that witnesses may seek to avail of special measures. Figures obtained from the Northern Ireland Court Service show that 24 anti-social behaviour orders were made in Northern Ireland in 2007, 40 were made in 2008 and 24 in 2009. Where civil remedies for domestic violence are concerned, 3334 non molestation orders and 1068 combination non molestation and occupation orders were disposed of in magistrates' courts in 2006, 4734 orders were disposed of in 2008 and 5246 in 2009.⁴⁴ It is therefore likely that if special measures were made available in civil courts, there would be a reasonable body of court users who would seek to avail of the protections.

The Commission's view

- 1.21 Having taken into account the views of consultees, having deliberated on the merits of introducing a scheme of special measures in civil proceedings and having considered the likelihood of the uptake by witnesses of such measures, the Commission has concluded that protections for certain witnesses in civil proceedings will promote access to justice for those witnesses and will offer valuable practical assistance to people who might experience difficulties in giving oral evidence directly in a courtroom setting.
- 1.22 The Commission considers that the best method of achieving such a scheme is to implement it on a statutory basis. Not only does this promote a consistent approach in courts across the jurisdiction, it also allows such a scheme to be exposed to the rigours of a transparent and accountable law-making process through the Northern Ireland Assembly. **The Commission therefore recommends that a scheme of special measures be put in place on a statutory basis in relation to civil proceedings in Northern Ireland.**

⁴³ Northern Ireland Statistics and Research Agency, *The Prevalence of Disability and Activity Limitations amongst adults and children living in private households in Northern Ireland* (Bulletin 1 July 2007).

⁴⁴ No statistics were available for 2007.

FURTHER ISSUES TO BE CONSIDERED

- 1.23 Since the Commission is recommending the implementation of special measures in civil courts in Northern Ireland, a number of other issues fall to be considered. First, it must be determined which witnesses are eligible for such a scheme and second, the types of special measure which are made available to these witnesses must also be considered. These issues are discussed in chapters 2 and 3 of this report. There are also certain practical issues which require consideration.

Practical considerations

- 1.24 As well as the substantive issues of law which the Commission must consider, the procedural practicalities of how a witness may obtain special measures in civil proceedings must also be explored. The Commission does not intend to be prescriptive about the procedures which may be invoked in order to facilitate applications from parties and their witnesses for special measures as that is a matter for those who may wish to implement the recommendations made in this report. However, the Commission does consider that it would be helpful if it made some suggestions in this regard.

Identifying witnesses who are eligible for special measures

- 1.25 It is important to identify potential users of special measures in civil proceedings. It is envisaged by the Commission that special measures could be obtained by court users in two ways. First, special measures could be applied for by parties to proceedings, both for themselves and for their witnesses. Second, the court, of its own motion, should be able to direct that special measures should apply to someone who is giving evidence. Where parties to proceedings and their witnesses would be eligible to use special measures, the primary responsibility will undoubtedly fall on their legal representatives to make them aware of the existence of these measures. It is likely that legal representatives would need to proactively raise the issue of whether a party or witness may wish to avail of special measures, as it may not be immediately obvious that he may be eligible for protections whilst giving evidence. It is therefore important that there is effective training and awareness-raising within the legal professions to embed special measures into legal culture. This role can be supported and prompted by the appropriate changes to court application

forms and witness summonses which could be amended to include reference to considering whether special measures are applicable. This last alteration is particularly important in cases where a witness who is not a party to the proceedings may wish to avail of special measures.

- 1.26 It is straightforward enough to determine whether a witness falls within the definition of “child”, as all that is required for proof is a birth certificate. However, it is more complicated to ascertain whether someone is living with mental ill-health, a learning disability or a physical disability. It is suggested that appropriate medical evidence be provided to demonstrate to the court that the application for special measures has merit. While the provision of this medical evidence is unlikely to be cost neutral, it is anticipated that more often than not a simple report from a general practitioner should suffice. The Commission does not imagine that many objections to the use of special measures will occur if this type of evidence is produced. Unlike in criminal proceedings,⁴⁵ where a specific application to admit hearsay evidence is required before evidence of this nature can be adduced, hearsay evidence can be admitted in civil proceedings without the need for a specific application to the court.
- 1.27 Where fear and distress in connection with giving evidence is concerned, the Commission takes the view that it is likely that the issue of witness eligibility for special measures in civil proceedings will follow the direction that has been taken in criminal proceedings. Various cases have considered the proofs required to demonstrate that a witness is suffering from fear and distress which may mean that the quality of his evidence may be diminished. For example, in *R v Black*⁴⁶ it was held that a mere assertion that a witness had visited his general practitioner due to the stress of the proceedings, without any corroborative medical evidence was not enough to persuade the court that special measures should be granted. However, in *AB*⁴⁷ it was held that there was no need for a medical report in a case in which the victim was tied up, gagged and raped by the defendant. In criminal proceedings, therefore, the court has a wide discretion when it comes to determining when special measures should be granted and the Commission considers that this approach would be helpful in civil proceedings.

⁴⁵ Part III of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

⁴⁶ [2007] NICC 4.

⁴⁷ [2007] NICC 26.

1.28 Procedures will also have to be put in place to allow the court to have an opportunity to consider whether a witness who is eligible for special measures should be granted them. This will require a hearing before the court to allow the application to be considered and to facilitate any objections from other parties involved in the proceedings. Many family cases have directions hearings prior to their determination and the Commission anticipates that any matters relating to the granting of special measures could be dealt with during these hearings. In other types of civil proceedings, hearings before the court which are set for case management purposes should be considered as efficient opportunities to determine questions pertaining to special measures.

CHAPTER 2. ELIGIBILITY FOR SPECIAL MEASURES

2.1 The Commission has concluded, based on consideration of the current law and practice and the views of consultees, that a strong case can be made for creating a statutory regime for the provision of special measures for certain witnesses in civil cases. It is therefore necessary to make recommendations regarding two issues: which witnesses should be able to benefit from special measures; and the types of special measure that should be made available to those witnesses.

WHO SHOULD BE ELIGIBLE FOR PROTECTION?

2.2 In the consultation paper,⁴⁸ consideration was given to the issue of who should be deemed to be a “witness” for the purposes of the creation of a scheme of special measures in civil proceedings. The Commission had provisionally concluded that the only sensible approach appeared to be to allow all parties and witnesses in civil proceedings to avail of special measures. This provisional recommendation was made on the basis that there seemed to be no justification for differentiating between parties in proceedings of this nature: all parties come before the court on even terms in civil proceedings. There also seems to be no reason to differentiate between parties and witnesses in civil proceedings, unlike in criminal proceedings where a “vulnerable” accused has more limited access to protection than witnesses. This is the approach taken in Scotland⁴⁹ and New Zealand⁵⁰ which base eligibility on the fact of giving evidence rather than any status or role the evidence-giver may have within the trial process.

2.3 The consultation paper asked consultees for their views on the Commission’s provisional recommendation that all parties to civil proceedings should be able to use special measures if they are eligible to do so. All but one of those who responded agreed with the Commission. The consultee who did not agree with this approach was concerned that perpetrators of domestic violence may attempt to use special measures to further abuse or undermine their victims.

⁴⁸ See page 44.

⁴⁹ Section 11 of the Vulnerable Witnesses (Scotland) Act 2004 refers to vulnerable witnesses in terms of them “giving evidence....in or for the purposes of any civil proceedings”.

⁵⁰ Under section 4 of the Evidence Act 2006, “witness” is defined as “a person who gives evidence and is able to be cross-examined in a proceeding”.

The Commission has considered this argument and has concluded that it is important that all parties to civil proceedings must be given an opportunity to avail of special measures if they meet the eligibility requirements. No judgment on the merits of either party's case can or should be drawn from the court's decision to grant special measures. This premise is given particular weight in indictable criminal cases as there is an obligation on the judge to give the jury (if there is one) a warning to ensure that the fact that a special measures direction was given does not prejudice the accused.⁵¹ In civil cases, this is less of an issue because juries are seldom involved.⁵²

- 2.4 Taking into account the views of consultees and considering also the approaches taken in the Scottish⁵³ and New Zealand⁵⁴ legislation, **the Commission recommends that all parties and witnesses involved in civil proceedings should be able to avail of special measures if they are eligible to do so.**⁵⁵

DETERMINING ELIGIBILITY

- 2.5 In the consultation paper, the Commission considered how eligibility for special measures in civil proceedings could be determined.⁵⁶ It was recognised that giving evidence in court is unlikely to be an activity that most witnesses will enjoy. However, for some witnesses, the experience goes beyond general feelings of apprehension and unease and crosses over into levels of stress and anxiety which far exceed the emotions which may usually be associated with giving evidence in court.

The criminal model in Northern Ireland, Scotland and England and Wales

- 2.6 The consultation paper considered the variety of factors which may influence whether a witness will feel undue stress and anxiety when giving evidence in

⁵¹ Article 20 of the Criminal Evidence (Northern Ireland) Order 1999.

⁵² Section 62 of the Judicature (Northern Ireland) Act 1978 makes provision for cases which may be tried with a jury upon request of a party to an action. Where defamation is involved, note the position following the judgment of the Court of Appeal in *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730 and also note the proposed affect of clause 14 of the Defamation Bill which was introduced in the House of Lords on 26 May 2010.

⁵³ See section 11 of the Vulnerable Witnesses (Scotland) Act 2004.

⁵⁴ See section 4 of the Evidence Act 2006.

⁵⁵ In this paper, "witness" should be taken as meaning "witness and a party to proceedings", unless otherwise specified.

⁵⁶ Chapter 5 paragraphs 5.5 to 5.34.

court. The criminal law models which have been created in Northern Ireland,⁵⁷ Scotland,⁵⁸ and England and Wales⁵⁹ all recognise that such factors can be classified into two main groups: factors which stem from a particular characteristic of the witness which may make him more “vulnerable” when giving evidence; and factors that may contribute to a witness suffering from fear and distress in relation to giving evidence in court proceedings.⁶⁰

2.7 Various categories of witness are eligible to avail of special measures in criminal proceedings in Northern Ireland at present under the provisions of the Criminal Evidence (Northern Ireland) Order 1999. Children who are under the age of 17 at the date of the hearing are eligible.⁶¹ A witness will also be eligible to apply for special measures if the court considers that the quality of his evidence is likely to be diminished because he suffers from a mental disorder⁶² within the meaning of the Mental Health (Northern Ireland) Order 1986⁶³ or he otherwise has a significant impairment of intelligence and social functioning.⁶⁴ Eligible witnesses also include those who the court considers are likely to have the quality of their evidence diminished because they have a physical disability or disorder.⁶⁵ Witnesses whose evidence is likely to be diminished by reason of fear and distress in connection with giving evidence can also use special measures.⁶⁶

2.8 The Criminal Evidence (Northern Ireland) Order 1999 contains a variety of special measures for witnesses in criminal proceedings. The types of measure are as follows:⁶⁷

- The use of screens;⁶⁸

⁵⁷ Criminal Evidence (Northern Ireland) Order 1999.

⁵⁸ Criminal Procedure (Scotland) Act 1995 as amended by the Vulnerable Witnesses (Scotland) Act 2004.

⁵⁹ Youth Justice and Criminal Evidence Act 1999 as amended by the Coroners and Justice Act 2009.

⁶⁰ This classification also applies to the Scottish civil law model contained in section 11 of the Vulnerable Witnesses (Scotland) Act 2004.

⁶¹ Article 4(1)(a) of the Criminal Evidence (Northern Ireland) Order 1999. It should be noted that the legislation contains provision for the extension of protection to certain witnesses who are over the age of seventeen at the date of hearing, but who were under seventeen at the time when a video-recording of an interview was made (see Article 10 of the Criminal Evidence (Northern Ireland) Order 1999).

⁶² Article 4(2)(a)(i) of the Criminal Evidence (Northern Ireland) Order 1999.

⁶³ Mental disorder is defined as “mental illness, mental handicap and any other disorder or disability if the mind” (Article 3 of the Mental Health (Northern Ireland) Order 1986).

⁶⁴ Article 4(2)(a)(ii) of the Criminal Evidence (Northern Ireland) Order 1999.

⁶⁵ Article 4(2)(b) of the Criminal Evidence (Northern Ireland) Order 1999.

⁶⁶ Article 5(1) of the Criminal Evidence (Northern Ireland) Order 1999.

⁶⁷ For more detailed discussion of these special measures, see chapter 6 of the consultation paper.

- Giving evidence by way of live television link;⁶⁹
- Giving evidence in private;⁷⁰
- The removal of wigs and gowns;⁷¹
- Video-recorded evidence-in-chief;⁷²
- Video-recorded cross-examination or re-examination;⁷³
- Examination of a witness through the use of an intermediary;⁷⁴ and
- The use of aids to communication.⁷⁵

2.9 It should be noted that witnesses who are eligible for special measures on the basis that:

- (a) they are under the age of seventeen;
 - (b) the quality of their evidence is likely to be diminished by reason of living with a mental disorder or a significant impairment of intelligence and social functioning; or
 - (c) the quality of their evidence is likely to be diminished because they are experiencing a physical disability or disorder
- are able to apply to the court for all special measures. Witnesses who are eligible for special measures on the basis that the quality of their evidence is likely to be diminished by reason of fear or distress in connection with giving evidence are allowed to apply for any special measure apart from the ones which permit the use of intermediaries or aids to communication.

2.10 The Criminal Evidence (Northern Ireland) Order 1999 makes additional and special provision for child witnesses. As well as the general eligibility to apply for all the special measures available under the legislation, Article 9 of the Criminal Evidence (Northern Ireland) Order 1999 provides that the court must allow any video-recording of an interview with a child which was made with a view to its admission as his evidence-in-chief to be admitted as such. This provision is subject to the availability of this facility in the district in which the court proceedings are held.⁷⁶ It is also subject to the requirement that it is in the

⁶⁸ Article 11 of the Criminal Evidence (Northern Ireland) Order 1999.

⁶⁹ Article 12 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷⁰ Article 13 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷¹ Article 14 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷² Article 15 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷³ Article 16 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷⁴ Article 17 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷⁵ Article 18 of the Criminal Evidence (Northern Ireland) Order 1999.

⁷⁶ Article 9(4)(a) of the Criminal Evidence (Northern Ireland) Order 1999 which applies Article 6(2) of the same Order.

interests of justice to admit the video-recording.⁷⁷ The court must allow any evidence which is not to be given by video-recording to be given instead by live television link.⁷⁸ This rule, which is known as the primary rule, will not apply if the court considers that compliance with it would not be likely to maximise the quality of the witness's evidence.⁷⁹

The New Zealand model

2.11 The New Zealand model which is contained in section 103 of the Evidence Act 2006 differs somewhat from the models adopted in Northern Ireland, Scotland and England and Wales. Rather than adopting the classification described above, a set of six criteria is created which, if met, will justify the witness giving evidence by alternative means rather than orally, in person, before the court.

2.12 The six criteria are:

1. the trauma suffered by the witness;
2. the linguistic or cultural background or beliefs of the witness;
3. the nature of the proceedings;
4. the nature of the evidence that the witness is expected to give;
5. the relationship of the witness to any party in the proceedings; and
6. the absence or likely absence of the witness from the jurisdiction.

2.13 The Commission had taken the view in the consultation paper that criteria 1, 3, 4 and 5 tended to imply that the witness is experiencing fear and distress about giving evidence in court. Having reflected upon that initial view, the Commission still considers that these criteria are better dealt with as factors which may diminish the quality of a witness's evidence because the witness is experiencing fear and distress in connection with giving evidence to the court: the approach taken in Northern Ireland, Scotland and England and Wales. Consultees were supportive of this approach and following the consultation process, the Commission is still of the view that it finds the approach taken in Northern Ireland, Scotland and England and Wales preferable. If this approach is taken in relation to special measures in civil proceedings, there is also the added benefit that familiarity with the methodology in criminal proceedings may mean that there is more understanding of any changes that would affect the civil law.

⁷⁷ Article 9 (4)(b) of the Criminal Evidence (Northern Ireland) Order 1999 which applies Article 15(2) of the same Order.

⁷⁸ Article 9(4)(b) of the Criminal Evidence (Northern Ireland) Order 1999.

⁷⁹ Article 9(4)(c) of the Criminal Evidence (Northern Ireland) Order 1999.

- 2.14 Having concluded that any scheme for special measures in civil proceedings should be based on the models that are in place for criminal proceedings in Northern Ireland, Scotland and England and Wales (and civil proceedings in Scotland) rather than New Zealand, the Commission is required to consider whether the specific elements of those models are appropriate for civil proceedings in Northern Ireland.

CHILD WITNESSES

- 2.15 The Commission considers that it is important that children are afforded protection when giving evidence in court proceedings. Although there does not appear to be a body of work examining the effects on children of giving evidence in court in civil proceedings, there has been a great deal of study in relation to the experiences of children who have given evidence in criminal proceedings, albeit with a focus on the experiences of children testifying in cases involving sexual assaults. In the consultation paper,⁸⁰ the Commission considered a number of research studies which had concluded that the effects of giving evidence on children included anxiety and behavioural disturbances⁸¹ and difficulties in understanding the complex language often used in court.⁸² Although these studies have been undertaken in the context of the criminal law, it is likely that any child having to give evidence in civil proceedings will also be daunted by the prospect and will find the experience unpleasant.

The Consultation response

- 2.16 In the consultation paper, the Commission suggested that it is not appropriate to expect children, especially young children, to face the rigours of giving evidence in court without some form of protection. All the consultees who provided their views on the issue agreed with that assertion and welcomed the prospect of introducing protective measures for children in civil proceedings. One consultee commented that special measures in civil proceedings would minimise any barriers to obtaining a child's best evidence and would shield child witnesses from negative or traumatic experiences in court. This consultee also mentioned that it was considered important to take into account the effect that a

⁸⁰ Paragraphs 5.11 – 5.12.

⁸¹ Goodman, Taub, Jones, England, Port, Ruby and Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (1992) 57 *Monographs of the Society for Research in Child Development* p1-141.

⁸² Joyce Plotnikoff and Richard Woolfson, *Measuring Up? Evaluating the implementation of government commitments to young witnesses in criminal proceedings* (London: National Society for the Prevention of Cruelty to Children, July 2009) p6.

damaging experience would have on a child's perceptions of the justice system throughout their lives. Another consultee considered that the extension of special measures to civil proceedings would allow Northern Ireland to further comply with international standards concerning the rights of the child. Therefore, **the Commission recommends that child witnesses should be eligible for special measures in civil proceedings.**

Issues to be considered

- 2.17 The consultation paper had highlighted three specific issues which arise as a result of allowing child witnesses to be eligible for special measures: the upper age limit for eligibility; the issue of whether children should be automatically eligible for special measures; and whether they should be afforded an opportunity to "opt out" of availing of special measures when giving evidence in civil proceedings.

Upper age limit

- 2.18 Currently, in criminal proceedings in Northern Ireland, special measures are available to a child who is under the age of seventeen⁸³ whilst these protections can be extended to those over the age of seventeen in limited circumstances.⁸⁴ In Scotland, child witnesses under sixteen years of age in civil⁸⁵ and criminal⁸⁶ cases can avail of special measures. In England and Wales, the Coroners and Justice Act 2009 extends the age limit for eligibility for special measures from seventeen to eighteen years of age.
- 2.19 In the consultation paper,⁸⁷ the Commission suggested that limiting the definition of "child" to those under the age of seventeen or sixteen would effectively limit protection for some young people who may be in need of assistance when giving evidence in court. The Commission is anxious to ensure that protective measures are available to a maximum number of children. All the consultees who provided views on the issue of the definition of "child" agreed with this provisional recommendation. A number of consultees considered that

⁸³ Article 4(1)(a) of the Criminal Evidence (Northern Ireland) Order 1999 which is prospectively amended by section 7 of the Justice Act (Northern Ireland) 2011.

⁸⁴ Article 10 of the Criminal Evidence (Northern Ireland) Order 1999.

⁸⁵ Section 11(1)(a) of the Vulnerable Witnesses (Scotland) Act 2004.

⁸⁶ Section 271 of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1(1) of the Vulnerable Witnesses (Scotland) Act 2004.

⁸⁷ At paragraph 5.15.

this was an approach which was supported by the current definition of “child” contained in the United Nations Convention on the Rights of the Child and would offer the greatest level of protection to the greatest number of children in Northern Ireland.

- 2.20 Therefore, having taken into account all considerations and the views of consultees, **the Commission recommends that any special measures should be available to children under the age of eighteen.**

Automatic protection?

- 2.21 In its current form, the Criminal Evidence (Northern Ireland) Order 1999 creates an automatic entitlement for children to avail of certain special measures. Article 9(3)(a) requires the court to allow a video-recording of an interview with the child to be admitted as his evidence-in-chief if the tape was made with that purpose in mind. Any other evidence that the child is required to give must be given by live television link, if it is not otherwise given by video-recording.⁸⁸ This is subject to the provisos that the special measures must be available for use by the witness,⁸⁹ that the admission of the video-recording as evidence must be in the interests of justice⁹⁰ and that use of the special measures is likely to maximise the quality of the witness’s evidence.⁹¹

- 2.22 The Commission has considered whether this approach should be adopted for child witnesses in civil proceedings. There appears to be two separate but connected matters to reflect on. First, there is the issue of whether children should automatically be entitled to use special measures when giving evidence. Once that first issue is resolved, it must be considered whether child witnesses should be automatically entitled to give their evidence in chief by video-recording.

- 2.23 The Commission and consultees are firmly of the view that child witnesses should be automatically entitled to use certain special measures when giving evidence. The Commission considers that this approach takes account of the

⁸⁸ Article 9(3)(b) of the Criminal Evidence (Northern Ireland) Order 1999. The reference to giving evidence other than evidence-in-chief by video-recording is no doubt a reference to the policy intention to allow cross-examination and re-examination to be pre-recorded. The provision, contained in Article 16 of the Criminal Evidence (Northern Ireland) Order 1999 has not as yet been commenced.

⁸⁹ Article 9(4)(a) of the Criminal Evidence (Northern Ireland) Order 1999.

⁹⁰ Article 9(4)(b) of the Criminal Evidence (Northern Ireland) Order 1999.

⁹¹ Article 9(4)(c) of the Criminal Evidence (Northern Ireland) Order 1999.

needs of a child who may not necessarily be mature enough to deal with the rigours of the evidence giving process and goes some way to offering protection against undue stress and trauma. In the Commission's opinion, the court system should not expect children to be as robust and resilient to an adversarial process of questioning as adults. However, the Commission considers that it is important that the court is given some flexibility by adding a proviso that the use of those special measures must be likely to maximise the quality of the child's evidence. It is counterproductive to require a child to give evidence by way of special measures if the quality of his evidence will be diminished by their use. This methodology has been developed in the criminal law, and the Commission considers that it is now time to recommend that the same approach is taken in civil proceedings. Therefore, **the Commission recommends that child witnesses are automatically entitled to certain special measures, unless those special measures will not maximise the quality of the child's evidence.**

- 2.24 The Commission is, however, not convinced that child witnesses in civil proceedings should be automatically entitled to give their evidence by way of video-recording. This special measure gives rise to a number of difficulties if applied within the context of civil proceedings. The production of pre-recorded evidence requires good quality equipment, comprehensive guidance, trained facilitators and a consistency of approach, coupled with adequate mechanisms to monitor the performance of facilitators and ensure that standards are set and adhered to. These difficulties are given more detailed consideration in chapter three of this report. The Commission is therefore not convinced of the merits of recommending that child witnesses should be automatically entitled to give their evidence by way of video-recording. However, the Commission does consider that there is benefit in recommending instead that children should have an automatic entitlement to give all their evidence by way of live television link in civil proceedings, that is to say, examination-in-chief, cross examination and re-examination, unless, of course, the use of that special measure will not be likely to maximise the quality of the child's evidence. This automatic entitlement can be enhanced as necessary by the use of other appropriate special measures, if the court considers that their use would be likely to improve the quality of the child's evidence. **The Commission recommends that children should be automatically entitled to give their evidence by way of live television link, unless the use of that special measure will not be likely to maximise the quality of their evidence. This automatic protection should be capable of**

being enhanced by the use of other appropriate special measures, where necessary.

Opting out

- 2.25 The provisions of the Coroners and Justice Act 2009 have created a facility for child witnesses to opt out of the automatic entitlement to special measures in criminal proceedings. This is a move away from a paternalistic approach to determining the protections to be afforded to a child witness towards an appreciation that it is important to consider a child's wishes regarding decisions which affect him.
- 2.26 Section 100 of the Coroners and Justice Act 2009 provides that children have the option of foregoing the automatic entitlement to giving pre-recorded evidence-in-chief and cross-examination and re-examination by way of live television link, provided that the court is satisfied that the quality of the child's evidence will not be diminished by doing so. If the child does opt out of using the special measures which he is automatically entitled to, he must give his evidence from behind a screen. However, this requirement does not apply if the court considers that giving evidence in this way is not likely to maximise the quality of the evidence. The legislation further provides that a child can also opt out of using a screen. When deciding whether a child can opt out of using these special measures, the court is obliged to take into account a number of considerations: the age and maturity of the child; the child's ability to understand the consequences of giving live evidence in court; any relationship between the witness and the accused; the witness's social and cultural background and ethnic origins; the nature and circumstances of the offence as well as any other factors which the court considers to be relevant.⁹² Similar provisions have been developed in Northern Ireland and are contained in the Justice Act (Northern Ireland) 2011 which has recently been passed by the Northern Ireland Assembly and which received Royal Assent on 4th May 2011.⁹³
- 2.27 In Scotland also, child witnesses have been given the ability to opt out of using special measures to give their evidence in court in criminal⁹⁴ and civil⁹⁵

⁹² Section 100 of the Coroners and Justice Act 2009.

⁹³ Section 8(4)(b) of the Justice Act (Northern Ireland) 2011.

⁹⁴ Section 127A of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.

⁹⁵ Section 12 of the Vulnerable Witnesses (Scotland) Act 2004.

proceedings. A child may give evidence without using special measures only if the court is satisfied that the child has expressed a wish to give evidence without the benefit of special measures and it is appropriate for him to do so. The court will also dispense with special measures if it is demonstrated that their use would give rise to a significant risk of prejudice to the fairness of the proceedings or to the interests of justice and that risk significantly outweighs any risk to the interests of the child. The court is also required to consider the views of the child witness when making its decision, together with the views of the child's parent or a person with parental responsibility for the child as well as taking the best interests of the child into account.⁹⁶

- 2.28 In the consultation paper, the Commission asked consultees for their views regarding the inclusion of a provision to allow child witnesses to opt out of using special measures in civil proceedings. All the consultees who responded to the question agreed that such a provision should be recommended by the Commission. A number of consultees stated that they considered that a provision of this nature would be one method of complying with Article 12 of the United Nations Convention on the Rights of the Child.⁹⁷
- 2.29 Consultees also provided views on the safeguards which should be put in place to ensure that a balance is struck between protecting child witnesses and allowing them to exercise discretion in relation to their method of giving evidence. One consultee commented that it is important that children are properly informed about the special measures before they are allowed to take the decision. This consultee suggested that children should be allowed to make their decision after visiting court to see a demonstration of the operation of the special measures. The Commission agrees with this suggestion: it is important that a child witness is able to make an informed decision about opting out of special measures and it is important that the court is satisfied that the child has received adequate information to allow an informed decision to be reached.
- 2.30 A number of consultees suggested that age limits should be set to determine whether or not a child should be entitled to opt out of using special measures.

⁹⁶ Section 271E of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004 (criminal proceedings) and section 15 of the Vulnerable Witnesses (Scotland) Act 2004 (civil proceedings).

⁹⁷ Under Article 12 of the United Nations Convention on the Rights of the Child, a child who is capable of forming his own views and opinions has the right to express those views and opinions freely in any matter or procedure affecting the child and to have that opinion given due weight according to the age and maturity of the child.

One of these consultees suggested the age of nine should be the determining age, whereas the age of thirteen was identified by a group of young people who met with the Commission to discuss the issues. This group of young people also expressed their belief that the level of understanding of the child witness was crucial in the decision making process. This concern was mirrored by another consultee who believed that it was important that the court considered the child's ability to understand the consequences of giving their evidence without the use of special measures. The Commission considers that setting an age limit is too arbitrary: a better approach is to allow the court to assess the understanding of the individual child. This allows the court to make decisions which are tailored to the child in question, based on his actual needs, rather than an artificial assessment based on his age.

- 2.31 One consultee suggested that the checklist of factors contained in *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses Using Special Measures and Provision of Pre-trial Therapy* which are to be taken into account when interviewing victims should be considered as possible factors for the court to consider when determining whether a child should be able to opt out of using special measures. These factors include the child's age, race, culture, ethnicity and first language, religion, gender, sexuality, physical or learning impairments, specialist health or mental health needs, cognitive abilities, linguistic abilities and emotional state. The factors also contain practical considerations such as types of discipline used with the child, bathing, toileting and bedtime routines and sleeping arrangements.

Parental views

- 2.32 In the consultation paper, consultees were asked whether they considered that a factor which required the court to take into account the best interests of the child and the views of the child's parent or someone with responsibility for him should be considered by the court. This approach met with support from a number of consultees who provided their views in relation to this question. One consultee considered that the best interests of the child should be the sole determining factor for the court to take into account, whilst another viewed the approach as being consistent with the principles of the United Nations Convention on the Rights of the Child. Other consultees were not convinced that the inclusion of such a factor would be useful. One consultee questioned how the court could justify "being led by the wishes and feelings of a witness

who does not have Article 6⁹⁸ rights when doing so may make the job of the legal representatives of the party who has Article 6 rights more difficult". Having considered this point, the Commission's view is that this assertion does not sit well with decisions of the European Court of Human Rights. For example, in *Doorson v Netherlands*⁹⁹ and *Mechelen v Netherlands*¹⁰⁰ it has been held that the life, liberty and security of witnesses is an interest that should be taken into account by Member States when organising their court proceedings.

- 2.33 A number of other consultees warned that allowing parental wishes to be taken into account could be problematic if the parent whose views are sought is not acting in the best interests of the child. The Commission accepts that, sadly, this may be a feature of some civil cases, particularly family law cases; however, the factor would be only one of a number which the court must take into account. It is important that the court hears the views of those closest to the child, who should know the child's personality and, in principle, should be in a better position than the court to predict his reactions to questioning in a courtroom. However, the Commission considers that the court should have the flexibility to weigh the value of the parental view in cases where the wishes of a parent or a person with parental responsibility for a child may be in conflict with the child's best interests. On balance, having considered the issues raised by consultees, the Commission is of the view that such a factor should be included as a safeguard for child witnesses who wish to opt out of using special measures.

Recommendation

- 2.34 Having considered the views of consultees, the Commission is content to recommend that child witnesses should be given an opportunity to opt out of using special measures in civil proceedings. The Commission considers that a child may opt out of using live television link and may instead give evidence from behind a screen, provided that such an action would not diminish the quality of the witness's evidence. If the child wishes to opt out of using a screen to assist him with his evidence giving as well, then he can do so, provided that the quality of his evidence will not be diminished. However, this facility must be subject to safeguards for the child. In making a decision regarding whether a child can opt out of using special measures, the Commission considers that a

⁹⁸ Article 6 of the European Convention on Human Rights (right to a fair trial).

⁹⁹ (1996) 22 EHRR 330 at paragraph 70.

¹⁰⁰ (1997) 25 EHRR 647 at paragraph 53.

number of factors should be taken into account by the court. The age and maturity of the witness must be considered, together with the ability of the witness to understand the consequences of giving evidence without using live television link or a screen, the best interests of the child, the views of the child's parents or anyone with parental responsibility for the child, the relationship between the child and any parties to the proceedings and the nature of the proceedings. The Commission also considers that it would be useful to have some form of "catch-all" provision included as well, which would allow the court to take any other relevant factor into account when determining whether a child witness can dispense with special measures. **The Commission therefore recommends that child witnesses should be afforded the opportunity to opt out of using live television link or screens, provided that the court agrees that opting out does not diminish the quality of the evidence, taking into account the following factors:**

- **the age and maturity of the child;**
- **the ability of the child to understand the consequences of giving evidence without special measures;**
- **the best interests of the child;**
- **the views of the parent or those with parental responsibility for the child;**
- **the relationship between the child and any party to the proceedings;**
- **the nature of the proceedings; and**
any other considerations which the court considers to be relevant.

Social and cultural background

- 2.35 The criminal model contained in the Coroners and Justice Act 2009 requires the court to take into account the social and cultural background and ethnic origins of the child when determining whether he should be allowed to opt out of using special measures. The Commission has considered these provisions carefully and has concluded that it is not convinced that these considerations are entirely relevant. It seems to the Commission that the issue that the court must consider is one of whether the child has sufficient autonomy to make decisions for himself and the understanding to fully appreciate the consequences of his decisions. This consideration is set against wider considerations such as the nature of the proceedings in which evidence is to be given, in order to allow the court to carry out a protective function in respect of the child. It is hard to see on this analysis where a child's social or cultural background or his ethnic origins is relevant, in fact, inclusion of such a consideration tends to suggest that a child's

social and cultural background and ethnic origin is relevant in determining whether he understands the consequences of his actions. The Commission considers that the inclusion of such a consideration in the Coroners and Justice Act 2009 is erroneous. However, if the Commission has misunderstood the policy intention and, for some reason, a child's social, cultural or ethnic origins is a relevant consideration for the court in a particular case, the catch-all provision which the Commission is recommending would afford the court flexibility to take this particular issue into account when making its decision.

MENTAL DISORDER OR SIGNIFICANT IMPAIRMENT OF INTELLIGENCE AND SOCIAL FUNCTIONING

2.36 In criminal proceedings in Northern Ireland, witnesses are eligible for special measures if the court considers that the quality of their evidence will be diminished because they are suffering from a mental disorder within the meaning of Article 3 of the Mental Health (Northern Ireland) Order 1986, or are otherwise suffering a significant impairment of intelligence and social functioning.¹⁰¹ In England and Wales, the same eligibility criteria apply, although reference is made to the corresponding mental health legislation which is applicable in that jurisdiction.¹⁰² In criminal¹⁰³ and civil¹⁰⁴ proceedings in Scotland, a witness will be deemed to be vulnerable if his evidence will be diminished as a result of him suffering from a mental disorder as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Court experiences

2.37 Recently, research was carried out on behalf of the Ministry of Justice in England and Wales which was commissioned to explore the assertion made by the mental health charity MIND in 2007 that people with mental health conditions and learning disabilities experience greater difficulties accessing justice than others and possibly also experience greater discrimination and disadvantage. This research¹⁰⁵ showed that court users, both in criminal and

¹⁰¹ Article 4 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁰² The definition of "mental disorder" in England and Wales is contained in section 1(2) of the Mental Health Act 1983 as inserted by section 1(2) of the Mental Health Act 2007.

¹⁰³ Section 271 of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.

¹⁰⁴ Section 11 of the Vulnerable Witnesses (Scotland) Act 2004.

¹⁰⁵ Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity*, Ministry of Justice Research Series (London: Ministry of Justice, July 2010).

civil proceedings, with mental health conditions and learning disabilities experience various particular difficulties when giving evidence in court. Many court users involved in the study found that legal language and terminology were barriers to their understanding of the court process, while a number stated that they experienced problems in understanding questions which they were asked in court. The report concluded that this lack of understanding resulted in confusion for the court users which negatively affected their demeanour in court.¹⁰⁶ Those involved in the study reported that difficulties with understanding were improved by awareness of their particular mental health issue or learning disability amongst legal representatives and the judge, as this allowed the court to take steps to ensure that the proceedings were clearly explained.¹⁰⁷ This approach led to the court user feeling more respected and listened to. However, if this awareness was lacking, court users experienced a sense of exclusion from the proceedings,¹⁰⁸ which the research found to be more acute in civil and family cases. In these cases, court users felt that they were prevented from being able to give evidence. When asked, court users who were living with mental illness or learning disability stated that they would benefit from being able to use special measures when giving evidence in court, particularly if screens or intermediaries were made available to them.¹⁰⁹ The research report makes a variety of recommendations, one of which is to recommend that in order to increase support to court users, the possibility of offering special measures in civil and family cases should be promoted.¹¹⁰

Consultation response

- 2.38 In the consultation paper, the Commission asked consultees whether they considered that people living with a “mental disorder” as defined by Article 3 of the Mental Health (Northern Ireland) Order 1986 and people experiencing a significant impairment of intelligence and social functioning should be eligible for protections to enable them to give their best evidence in civil proceedings.
- 2.39 All the consultees who replied to the question confirmed that they agreed with the Commission’s preliminary view that people living with a mental disorder or significant impairment of intelligence and social functioning should be eligible

¹⁰⁶ At page 8.

¹⁰⁷ At page 9.

¹⁰⁸ At page 10.

¹⁰⁹ At page 36.

¹¹⁰ Recommendation 8.4, p42.

for special measures. In its response, one consultee stated that, in its view, a disabled person, due to the disability, may experience heightened stress and anxiety and may, for example, have difficulty in understanding tribunal rules and procedures or communicating their evidence. Another consultee considered that it was only fair and reasonable to extend the protections afforded by special measures in the criminal context to civil proceedings. This consultee considered that such an extension, together with additional support, would prove to be beneficial to witnesses and to the court as a whole by “enabling individuals to give their best evidence to the court, allowing individuals to play a full role in their civil proceedings and ensuring access to justice.”

- 2.40 One consultee highlighted the need for systems to be put in place to identify witnesses who lack the capacity to decide to avail of special measures. This consultee also felt that decisions resulting from an identification of lack of capacity should be made in the witness’s best interests. It is interesting to note that other jurisdictions which employ special measures or alternative forms of evidence-giving, such as New Zealand or Scotland do not include a best interests test of this nature for witnesses. The Commission considers that a lack of capacity of this nature is likely to have an impact on whether or not a witness will actually be competent to give evidence during proceedings. Since the Commission is considering the issue of competence as part of this report, this issue is best dealt with within that context. Competence to give evidence in civil proceedings is discussed further in chapter 4 of this report.

Definition of “mental disorder”

- 2.41 One consultee noted concerns with the current definition of the term “mental disorder” under Article 3 of the Mental Health (Northern Ireland) Order 1986, which it considers to be an “inherently discriminatory legal concept”. In the consultation paper,¹¹¹ the Commission discussed the differing approaches taken to the definition of “mental disorder” in the three jurisdictions. In Scotland and England and Wales, people who are living with mental illness, learning disability or personality disorder¹¹² can apply to the court for special measures to assist them to give their best evidence to the court. In Northern Ireland, the current legislation which defines “mental disorder”, the Mental Health (Northern Ireland) Order 1986, specifically excludes personality disorders from the

¹¹¹ At paragraphs 5.20 – 5.22.

¹¹² Note that these definitions are not necessarily used in the relevant legislation.

definition, therefore, under the current scheme of special measures in criminal proceedings, these people are excluded from applying for protection.

- 2.42 Mental health legislation is currently under review in Northern Ireland, following the independent Bamford Review of Mental Health and Learning Disability (“the Bamford Review”) which was initiated in 2002. The Bamford Review produced a series of ten reports between June 2005 and August 2007, which together represent recommendations for radical reform and modernisation of mental health and learning disability law, policy and services. In October 2009, the Department of Health, Social Services and Public Safety (“DHSSPS”) issued an action plan for the implementation of these proposals.¹¹³ In addition, the Minister of Health, Social Services and Public Safety has agreed to bring forward a single piece of legislation, which will introduce, for the first time, mental capacity legislation which will empower a person with capacity to make and act on decisions regarding treatment, care, welfare, finances and assets and provide for mechanisms in relation to substitute decision-making for individuals who lack capacity to make decisions for themselves. The legislation will include mental health provisions which will also be capacity based. In August 2010, DHSSPS issued an Equality Impact Assessment on the policy behind the proposed legislation which sought the views of consultees on the equality implications of the proposals.¹¹⁴ It is anticipated by DHSSPS that a Bill will be introduced into the Northern Ireland Assembly in the latter part of 2011.
- 2.43 The proposed changes to mental health legislation have an important effect upon the Commission’s work as it is anticipated that the proposed legislation will: redefine “mental disorder”; create a definition of “learning disability”; and deal with the omission of “personality disorder” under the Mental Health (Northern Ireland) Order 1986. If the Commission’s recommendations are accepted by Government and taken forward in legislation, the drafting of that legislation will be greatly affected by the current status of mental health legislation. Even so, if the Mental Health (Northern Ireland) Order 1986 is still in place, reference must be made to that provision, in particular the definitions of mental disorder and significant impairment of intelligence and social functioning which are contained within it. It is not appropriate for a piece of legislation which

¹¹³ DHSSPS, *Delivering the Bamford Vision – the response of the Northern Ireland Executive to the Bamford Review of Mental Health and Learning Disability – Action Plan 2009-2011* (Belfast: DHSSPS, October 2009).

¹¹⁴ DHSSPS, *Mental Capacity (Health, Welfare and Finance) Bill - Equality Impact Assessment* (Belfast: DHSSPS, August 2010).

primarily deals with modes of giving civil evidence to alter concepts in mental health law. However, if the new mental health and mental capacity legislation is in place before any legislation resulting from this report, references can be made to the new provisions.

Recommendation

- 2.44 The Commission considers that it is important that people who are experiencing mental disorder or illness, those with learning disabilities and those living with personality disorders should be eligible for special measures in civil proceedings to enable them to give their best evidence to the court. Although it is important to avoid assumptions that every person experiencing these illnesses, disabilities or disorders will want or need to avail of special measures, the Commission considers that the presence of these special measures offers valuable protection to those people who feel they do need assistance to communicate that evidence to the court. The views of witnesses regarding whether they consider that they need to avail of special measures should also be considered by the court. The Commission considers that the availability of such measures serves as an opportunity for individuals to access justice who may otherwise feel discouraged about participating in court proceedings. **The Commission therefore recommends that people who are living with mental illness, learning disability or personality disorder should be eligible for special measures if the quality of their evidence is likely to be diminished because of that illness, disability or disorder.**

PHYSICAL DISABILITY OR DISORDER

- 2.45 In criminal proceedings in England and Wales¹¹⁵ and in Northern Ireland,¹¹⁶ witnesses with a physical disability or disorder may be eligible for special measures if the court considers that the quality of their evidence is likely to be diminished because of their disability or disorder. Whilst some witnesses may need additional assistance to communicate evidence to the court: for example, a deaf person may need an interpreter who is skilled in sign language, not every physical disability or disorder will necessarily affect a person's ability to give good quality evidence. There are, however, some witnesses who may experience difficulty in giving evidence because their physical disability or

¹¹⁵ Section 16(2)(b) of the Youth Justice and Criminal Evidence Act 1999.

¹¹⁶ Article 4(2)(b) of the Criminal Evidence (Northern Ireland) Order 1999.

disorder relates to the functioning of the brain. Someone who has had a stroke or a brain injury may find that their memory or their ability to communicate has been impaired.

2.46 In the consultation paper, it was noted that Scotland had taken a different approach to the issue of special measures for witnesses who experience a physical disability or disorder. In both civil and criminal proceedings, such a disability or disorder is not treated as a criterion which is deemed to have a direct effect on the quality of a witness's evidence. Instead, by virtue of section 11(2) of the Vulnerable Witnesses (Scotland) Act 2004, in civil proceedings, physical disability or other physical impairment is only one of a number of factors which the court must consider when looking at the question of whether a witness is eligible for special measures by reason of a mental disorder or because they are suffering fear and distress in connection with giving evidence.¹¹⁷

2.47 A number of consultees responded to this particular issue raised by the consultation paper. One consultee submitted that:

“Physical disability should remain a distinct category of eligibility for special measures due to the impact of social exclusion and isolation on some physically disabled people, who are in many instances going to find participation in the civil process more demanding than non-physically disabled people. Physically disabled people in our society remain more vulnerable to abuse than people in general and this particular vulnerability should be recognised in the special measures they are eligible to.”

2.48 Another consultee believed that the eligibility of a witness for special measures should be considered on the basis of the impact of the physical disability on the witness's ability to give evidence and the welfare of the individual concerned. The welfare point is an interesting one. The test for special measures in, for example, the criminal context in Northern Ireland is based on whether the quality of the witness's evidence is likely to be diminished by reason of a physical disability or disorder. This approach appears to have been developed to assist the court in procuring the best possible evidence on which to make its

¹¹⁷ Section 271 of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.

decisions. The Commission has considered whether a welfare or “best interests” style test is appropriate and has concluded that it is not. The Commission considers that the pertinent issue is whether individuals are enabled to give their best evidence to the court and participate fully in proceedings which affect them. If a best interests test was included for determining eligibility for special measures for individuals living with physical disability or disorder, it means that the court has to make a determination in relation to the best interests of a person who, in all likelihood, comes before the court with full decision-making capacity. This seems a rather paternalistic approach which is not appropriate to take in these circumstances. Additionally, if special measures were to be imposed on the basis of an individual’s “best interests”, yet these special measures could not be shown to be likely to enhance the quality of the evidence given by the witness, then arguably that witness’s ability to access justice could be jeopardised by the imposition of special measures. For these reasons, the Commission is not convinced that a “best interests” test is appropriate.

- 2.49 Having taken into account the views of consultees, the Commission is of the view that its provisional recommendation contained in the consultation paper should be adopted as final. Therefore, **in order to maximise protection for witnesses and to offer the court maximum flexibility to assist witnesses who are experiencing a physical disability or disorder, the Commission recommends that physical disability or disorder should be an eligibility criterion for special measures in civil proceedings, if the disability or disorder is likely to result in the diminishment of the quality of the witness’s evidence.**

FEAR OR DISTRESS IN CONNECTION WITH GIVING EVIDENCE

- 2.50 Adult witnesses whose evidence may be diminished in quality because they are suffering fear or distress in connection with giving evidence in court are eligible for special measures in criminal proceedings in England and Wales,¹¹⁸ Scotland¹¹⁹ and Northern Ireland.¹²⁰ Likewise, in civil proceedings in Scotland, they are able to apply for special measures.¹²¹ In responses to the consultation

¹¹⁸ Section 17(1) of the Youth Justice and Criminal Evidence Act 1999.

¹¹⁹ Section 271(1)(b)(ii) of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.

¹²⁰ Article 5(1) of the Criminal Evidence (Northern Ireland) Order 1999.

¹²¹ Section 11(1)(b)(ii) of the Vulnerable Witnesses (Scotland) Act 2004.

paper, consultees were supportive of allowing such a category of protection in civil proceedings in Northern Ireland, although one consultee commented that it considered that fear and distress might be a less relevant consideration for adults giving evidence in civil proceedings, compared with those giving evidence in criminal proceedings. This consultee suggested that it might be useful to consider whether fear and distress should be a “mandatory eligibility criteria”. However, this response was rather contradictory, as it also suggested that fear and distress *should* remain a consideration. The Commission, however, remains of the view that fear and distress is a relevant eligibility criterion for special measures in civil proceedings. Although, to the knowledge of the Commission, no statistics exist in relation to witness intimidation in civil cases, it seems quite probable that instances will arise, since intimidation usually occurs when one party does not want another party to say or do something which will have unwanted consequences for the first party. It is entirely possible to conceive of such behaviour in cases involving family matters, particularly domestic violence or proceedings to evict a tenant. A number of the young people who met with the Commission to discuss their views on the issues raised in the consultation paper stated that they were particularly concerned about being involved in a case in which another party was a member of a paramilitary organisation. In these circumstances, the young people considered that special measures may offer particular protection. Therefore, **the Commission recommends that a witness in civil proceedings whose evidence may be diminished in quality because they are suffering fear or distress in connection with testifying should be eligible for special measures.**

Factors which may contribute to fear or distress

- 2.51 In order to allow the court to determine whether witnesses should be granted special measures on the basis of them experiencing fear and distress in connection with giving evidence, the legislation in each jurisdiction provides a checklist of factors which the court must take into account when making its decision. In Northern Ireland and in England and Wales, the factors are as follows:¹²²

¹²² The drafting of the legislation in each jurisdiction states that the court must take into account these factors “in particular”. This drafting suggests that the court may be able to take into account other factors, however, it may be useful for the sake of clarity to include a more definite “catch-all” such as “such other factor as the court considers relevant”. This is the effect of the drafting approach taken in Scotland.

- the nature and alleged circumstances of the offence to which the proceedings relate;
- the age of the witness;
- if relevant, the social and cultural background and ethnic origins of the witness;¹²³
- if relevant, the domestic and employment circumstances of the witness;
- if relevant, any religious beliefs or political opinions of the witness;
- any behaviour towards the witness on the part of the accused, members of the accused's family or associates or any other person who is likely to be an accused or a witness in the proceedings; and
- the views of the witness.

2.52 The consultation paper¹²⁴ noted that the approach taken in both criminal and civil proceedings in Scotland varies in some significant respects. In Scotland, additional factors have to be taken into account, namely:

- the nature of the evidence which the person is likely to give;
- the relationship of the witness to any party to the proceedings;
- the person's age *and maturity* (emphasis added);
- the witness's sexual orientation;
- if relevant, any physical disability or impairment; and
- any other matter which the court considers relevant.

2.53 Consultees were asked to comment on whether the additional factors included in the Scottish legislation would merit inclusion in any scheme for special measures in civil proceedings in Northern Ireland.¹²⁵ They were also asked

¹²³ The Commission considers that this particular wording is quite unusual. It does not appear to be used anywhere on the statute book apart from legislation which provides for special measures in Scotland, Northern Ireland, England and Wales. For instance, in section 9 of the Equality Act 2010, "race" is defined as including colour, nationality and ethnic or national origins. In the Northern Ireland context, there is perhaps a better formulation of words that can be used, which was adopted in the Northern Ireland Act 1998. Under Article 5 of the Race Relations (Northern Ireland) Order 1997, "racial group" is defined as being a group of persons defined by reference to colour, race, nationality or ethnic or national origins and includes the Irish Traveller community. In *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7, ethnic origins was held to include a number of essential and relevant characteristics, with one of the essential characteristics being cultural tradition including family and social customs. Read together, the Commission suggests that the appropriate wording should be "if relevant, the racial group of the witness", with a definition of racial group being provided that refers to the Race Relations (Northern Ireland) Order 1997.

¹²⁴ At paragraph 5.29.

¹²⁵ At paragraph 5.30.

whether there were any other factors which should be included in such a scheme.¹²⁶

Consultation response on the Scottish factors

2.54 Of the consultees who responded specifically to the Commission's question regarding whether inclusion of any of the Scottish criteria would merit inclusion in a scheme of special measures for civil proceedings, the majority were supportive of the inclusion of the additional Scottish criteria. One consultee commented that in order to pursue a legal action, a witness's sexual orientation may need to be disclosed to the wider public and as a consequence, he may be subject to physical or other abuse. One consultee considered that some of the Scottish factors made sense while others did not. This consultee was of the view that the inclusion of "sexual orientation" was unclear and argued that if it had been included as a result of the possibility of assaults and harassment on the grounds of sexual orientation, then race should also be included as a factor. Another consultee considered that the addition of the Scottish criteria would be useful in the belief that this approach would "afford additional protections for women who have experienced domestic violence".

2.55 Having taken into account the views of consultees, the Commission considers that a number of additional factors that are included in the Scottish legislation would be a useful addition to any legislative scheme governing the availability of special measures in civil proceedings in Northern Ireland. Sexual orientation should be included as a factor. Factors such as the relationship between the witness and any of the parties to the proceedings and the nature of the evidence that the witness is to give would offer valuable protection to witnesses who may have to give evidence in relation, for example, to domestic violence. The Commission also considers that it would be useful to include a clear "catch-all" provision to allow the court to consider any other factor which may have relevance to that particular witness or the particular proceedings in which evidence is to be given. However, the Commission does not see merit in including a factor relating to the physical disability or impairment of the witness, if that is to be recommended as a separate basis for seeking special measures. Nor does the Commission see merit in including "maturity" as an additional factor. The Commission is making specific recommendations in relation to children, therefore it seems unnecessary to include a factor of "maturity" which

¹²⁶ At paragraph 5.30.

relates in some way to the competence of a child to be able to make his own decisions. It also seems to the Commission that it is inappropriate to include “maturity” as a factor which should be taken into account in relation to an adult, as it appears to the Commission to be a rather difficult characteristic for the court to assess and determine.

Other factors

2.56 The consultation paper asked consultees whether they considered that any other factors should be relevant in deciding whether a witness is eligible for special measures on the basis of fear and distress in relation to giving evidence in civil proceedings. One consultee suggested that a factor should be included which takes into account the fear of the consequences of giving evidence in domestic violence cases. This consultee submitted that it was important that it was not assumed that a witness’s fear and distress resulted solely from the experience of, or anticipation of giving evidence in court, rather, in assessing the fear and distress suffered, account should be taken of the historical impact of long-term sustained abuse. The Commission considers that these representations will be adequately addressed by including factors such as “the nature and circumstances of the alleged matter to which the proceedings relate” (to borrow the language used in the Scottish legislation) and factors which take account of the nature of the evidence which the witness is to give and any relationship between the witness and any other party to the proceedings.

Recommendation

2.57 **The Commission recommends that the factors that the court must take into account when satisfying itself that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings should be as follows:**

- **the nature and circumstances of the alleged matter to which the proceedings relate;**
- **the nature of the evidence which the witness is likely to give;**
- **the age of the witness;**
- **the relationship (if any) between the witness and any party to the proceedings;**
- **such of the following matters as appear to the court to be relevant, namely;**

- (i) the racial group of the witness (as defined by the Race Relations (Northern Ireland) Order 1997;
- (ii) the domestic and employment circumstances of the witness;
- (iii) any religious beliefs or political opinions of the witness; and
- (iv) the witness's sexual orientation;
- any behaviour towards the witness on the part of:
 - (i) any party to the proceedings;
 - (ii) members of the family or associates of any such party; or
 - (iii) any other person who is likely to be a party to the proceedings or a witness in the proceedings; and
- such other matters as the court considers relevant.

Other considerations for the court to take into account

2.58 The Commission also considers that it is important for the court to take into account the views of the witness when deciding whether or not that witness should be eligible for special measures on the basis of fear and distress in connection with giving evidence in civil proceedings. It may appear, since the witness is making the application for special measures, that it may go without saying that his views are being taken into account, however, it is important to include this as a factor to ensure that the views of the witness are afforded the same weight as other factors.

OTHER ELIGIBILITY CRITERIA FOR SPECIAL MEASURES

Linguistic or cultural background

2.59 In the consultation paper, consultees were also asked whether they considered that the linguistic or cultural background or beliefs of the witness should be a specific eligibility criteria for special measures.¹²⁷ Only one consultee responded to the question and suggested that an individual's linguistic or cultural background or beliefs may be a determining factor as to whether they are, in the particular case, eligible for special measures. The Commission, however, does not agree with this approach. In the consultation paper, the Commission had stated that it was not attracted to the rationale for the inclusion of this ground in the New Zealand legislation, namely that due to the complexities of the translation process or the difficulties in obtaining a translator it may be

¹²⁷ At paragraph 5.33.

preferable for someone whose second language is English to give evidence in English. The New Zealand Law Commission and the legislature had therefore decided that if this was the case, the witness must be relatively unpressured and would therefore be best served by giving evidence outside the courtroom environment or by videotaped interview. The Commission has considered the Northern Ireland Court Service consultation paper on interpretation services¹²⁸ and a number of issues of the *Interpreter and Translation Services Quarterly Bulletins* (which are regularly published by Northern Ireland Court Service) and can find no evidence that a problem such as the one experienced by New Zealand exists in Northern Ireland currently. The Commission's preliminary view, expressed in the consultation paper, has not changed. Accordingly, it is considered that there is no need to recommend the inclusion of a factor of this nature, especially if cultural background and ethnicity is included in a list of factors which should be taken into account when determining whether a witness is suffering from fear and distress.

Other suggestions made by consultees

- 2.60 The consultation paper asked consultees whether they considered that there were any other relevant criteria for determining the eligibility of witnesses for special measures in civil proceedings. A few suggestions were made by one consultee who commented that if a witness was claiming to be eligible for special measures due to a mental disorder, it is relevant to consider whether that witness is seeking damages in the civil action for psychiatric injury. The consultee considered that if this was the case, the granting of special measures has the potential to allow the witness to exaggerate his psychiatric condition. The Commission does not think that this is a relevant consideration. The issue of whether a witness should be allowed to give evidence with the assistance of special measures is quite separate from questions on the merits of the case. In criminal cases, the relevant legislation provides that a warning must be given to the jury (if there is one) by the judge to ensure that the fact that special measures were granted should not prejudice the accused.¹²⁹ Civil cases are generally heard by a judge sitting alone and the Commission is content that a member of the judiciary will be capable of ensuring that a determination regarding special measures will not influence his decision on the outcome of the case. The same consultee also suggested that a relevant consideration in

¹²⁸ Northern Ireland Court Service, *Consultation Paper Provision of In-Court Interpretation Services* February 2010 (www.courtsni.gov.uk).

¹²⁹ Article 20 of the Criminal Evidence (Northern Ireland) Order 1999.

determining eligibility for special measures should be whether the witness has a vested interest in the outcome of the case. The Commission respectfully suggests that many witnesses may have a vested interest in the outcome, especially if they are parties to the proceedings, but this is not a reason to deny them the chance to be assisted when giving evidence to the court.

CHAPTER 3. TYPES OF MEASURE

INTRODUCTION

- 3.1 In criminal proceedings, the Criminal Evidence (Northern Ireland) Order 1999 allows eligible witnesses to avail of a number of special measures. The Commission has considered each of these measures in turn to determine their suitability for use in civil proceedings.

SCREENING

- 3.2 In the consultation paper, the Commission discussed the evolution of the use of screens in criminal proceedings. First given formal approval by the Court of Appeal in England and Wales in *R v X, Y and Z*,¹³⁰ the use of screens was given a statutory basis in England and Wales and Northern Ireland by virtue of section 23 of the Youth Justice and Criminal Evidence Act 1999 and Article 11 of the Criminal Evidence (Northern Ireland) Order 1999 respectively.
- 3.3 The practicalities of using screens in court proceedings are very straightforward. Whilst giving evidence in court, the witness is still seated in the courtroom, but will have a screen positioned to shield him from the view of everyone except the judge and lawyers (and the jury in criminal trials). Screens are easy to use, relatively inexpensive and their use has a minimal disruptive effect on court proceedings.
- 3.4 The consultation paper asked consultees whether they considered that there is merit in including the use of screens as part of a range of special measures to be adopted in civil proceedings. The majority of consultees who responded agreed that there is merit in using screens. Two consultees gave a more circumspect response. One consultee questioned whether screens were actually effective in protecting a witness, whilst another consultee suggested that they should be avoided where possible. The latter consultee considered screens to be more prejudicial than video evidence from the point of view of determining credibility. The Commission, however, questions the validity of this opinion, as it has been unable to uncover any evidence which substantiates this viewpoint. On the contrary, the use of screens has received acceptance on an international level. As one consultee, in welcoming the proposal, points out, the use of screens is

¹³⁰ (1989) 91 Cr App R 36.

included as part of a menu of possible special measures in the international guideline *UN Model Law on Justice in Matters Involving Child Victims and Witnesses of Crime 2009*.¹³¹

- 3.5 Having considered the views of consultees, the Commission concludes that the use of screens is a useful tool which could benefit witnesses who are eligible to avail of special measures while giving their evidence. **The Commission recommends that screens should be available to witnesses who are eligible for special measures in civil proceedings.**

EVIDENCE GIVEN IN PRIVATE

- 3.6 The Criminal Evidence (Northern Ireland) Order 1999 contains a specific special measure which allows a judge to order that the courtroom be cleared of people who do not need to be present when a witness gives evidence.¹³² In criminal cases, the accused, their legal representatives and any interpreter or other person appointed to assist the witness must be allowed to stay in court whilst the evidence is given. The court must also allow at least one member of the press to remain in court where such a person has been nominated by the relevant press organisations. The measure is of limited application in the context of providing protection to witnesses as it only applies in cases involving a sexual offence or when it appears to the court that there are reasonable grounds to believe that someone other than the accused has tried, or is likely to try, to intimidate the witness. The accused cannot be asked to leave the courtroom.
- 3.7 In the consultation paper, detail was given about the issues which arise with privacy in court proceedings, particularly including work which has been carried out in England and Wales in relation to privacy and disclosure of information in family proceedings cases involving children.¹³³ The issue of transparency in these proceedings is particularly pertinent at the present time, with sections 11 to 21 of the Children, Schools and Families Act 2010 making provision for the regulation of the publication of information about cases, court orders and judgments. This legislation does not extend to Northern Ireland, nor does

¹³¹ Article 28(e)(i).

¹³² This is a significant departure from the common law principle of open justice, see *Scott v Scott* [1913] AC 417 and *Attorney-General v Leveller Magazine Ltd and others* [1979] AC 440 *et al.*

¹³³ See consultation paper paragraphs 6.15 – 6.17.

section 62 of the Children Act 2004 which amends a number of pieces of existing legislation to allow court rules to be made which enable information relating to family proceedings concerning children to be disclosed in certain circumstances to individuals or organisations (but not to the general public or to the media) without a criminal offence or contempt of court being committed.

- 3.8 The consultation paper asked consultees whether a special measure to clear the courtroom is required in civil proceedings. The majority of consultees who responded to the question indicated that they were in favour of such a measure. Reasons given for this view included fears that in domestic violence cases under the Family Homes and Domestic Violence (Northern Ireland) Order 1998, members of an alleged perpetrator's family often came to court, which was intimidating to witnesses. It was also suggested that if a witness had to give evidence of a sexual assault in proceedings of this kind, the experience would be acutely distressing. Another consultee suggested that it may be appropriate to clear the court room in instances where a witness had to give evidence in relation to his sexual orientation, for example, in a case where a male to female transgendered appellant had applied to a tribunal for an order restricting attendance at the hearing on the basis that she feared that publicity would lead to intimidation and physical attacks on her and on her home.¹³⁴
- 3.9 Other consultees stressed the need to balance the benefits of having evidence heard in private with the desirability of ensuring transparency and openness in the courts, together with the rights of a party to receive a fair trial under Article 6 of the European Convention on Human Rights.
- 3.10 Having considered the consultation response, the Commission has deliberated further on the applicability of this particular special measure in civil proceedings. The Commission has concluded that this special measure should not be made available to witnesses in civil proceedings at this time. It has reached this decision based on a number of considerations. First, the special measure is of limited availability in criminal proceedings, it only being an option in cases involving a sexual offence or when it appears to the court that there are

¹³⁴ *JR5 v Department of Agriculture and Rural Development* [2007] NICA 19 (31 May 2007). In this case, it was decided that Rule 59 of the Industrial Tribunal Rules of Procedure which is contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 and which gives a tribunal power to regulate its own procedure should be read in the light of the requirements of the Equal Treatment Directive (2002/73/EC) to ensure that judicial or administrative procedures for the enforcement of rights under the Directive are available to all persons who consider themselves wronged by failure to apply equal treatment to them.

reasonable grounds to believe that someone other than the accused has tried, or is likely to try, to intimidate the witness. Second, there is further work to be carried out in Northern Ireland in relation to the issue of privacy, disclosure of information and publicity in family proceedings which arguably needs to be looked at as an issue in its own right.¹³⁵ Third, there is a need to respect the balance between openness in the courts, the Article 6 rights of parties to proceedings, and the protection of the needs of vulnerable witnesses in those proceedings. Taking these three considerations into account, the Commission believes that a specific special measure which allows for the court to be cleared in civil proceedings is not appropriate at this point. The needs of witnesses can be met by the availability of the other special measures recommended in this report, particularly the use of live television link which would ameliorate the difficulties of intimidation in the court room setting, as well as any distress caused by giving evidence on issues of a sensitive nature, since the witness is removed from the actual court room.

THE REMOVAL OF WIGS AND GOWNS

- 3.11 In criminal proceedings, the removal of wigs and gowns by judges and barristers is included as a special measure with the intention of creating a practical method of reducing the intimidating formality of the proceedings and putting the witness at greater ease. In Northern Ireland, moves have been made to promote more informality in civil courts also. In family proceedings in Northern Ireland, wigs and gowns have been dispensed with since 5 September 2006, when Practice Direction 4 of 2006¹³⁶ was issued. This Practice Direction states that barristers appearing in proceedings in the Family Division of the High Court and family care centres in the County Court under the Children (Northern Ireland) Order 1995, the Adoption (Northern Ireland) Order 1987 and the Hague Convention on the Civil Aspects of International Child Abduction are no longer required to wear wigs or gowns, unless the case is so exceptional that the judge in charge of proceedings directs otherwise. This Practice Direction also provides guidance in relation to the wearing of robes by judges in these cases. Like the wearing of wigs, robes are not to be worn in these cases, unless the case is so exceptional that the judge considers that they are appropriate. The Lord Chief Justice of Northern Ireland, the Right Honourable Sir Declan Morgan, made a further statement regarding court dress on 23

¹³⁵ For example, Article 168 and 170 of the Children (Northern Ireland) Order 1995.

¹³⁶ 11 May 2006.

October 2009,¹³⁷ when he directed that High Court and Court of Appeal judges in civil cases were no longer required to wear wigs and asked other court tiers to consider a similar approach.

- 3.12 In the consultation paper, consultees were asked whether the removal of wigs and gowns should be included as a special measure for eligible witnesses in civil proceedings. All the consultees who responded to the question indicated that they agreed that this special measure should be included, although one consultee noted that some witnesses may expect a certain level of formality in court proceedings and may question the authority of the court if wigs and gowns were not present. However, the Commission considers that this issue may be particular to certain individuals, rather than a generic concern. If a witness feels strongly about court formality, yet is still seeking special measures, the court should be able to take account of these views and use other special measures to achieve the objective of ensuring that the quality of the evidence is not diminished.
- 3.13 Having considered the views of consultees, the Commission is satisfied that including the removal of wigs and gowns in a list of possible special measures for eligible witnesses is a sensible approach which will formalise any practice which is currently in place. **The Commission therefore recommends that the removal of wigs and gowns should be included as a special measure in civil proceedings.**

VIDEO-RECORDED EVIDENCE-IN-CHIEF

- 3.14 One of the special measures available in criminal proceedings in Northern Ireland and England and Wales is the facility to pre-record the evidence-in-chief of a witness. An interview with a witness, carried out by trained interviewers, is recorded and later used in court as the witness's evidence-in-chief. This technique of pre-recording interviews dates back to the recommendations of the Pigot Report in December 1989,¹³⁸ whilst the interview process itself has been informed both by the findings of the Pigot Report and the *Report of the Inquiry into Child Abuse in Cleveland* which followed an inquiry by the Right Honourable Lady Justice Butler-Sloss in 1998.¹³⁹

¹³⁷ Reported on the BBC website on Friday 23 October 2009.

¹³⁸ Home Office, *Report of the Advisory Group on Video Evidence* (London: Home Office, December 1989).

¹³⁹ (July 1988) Cmnd. 412.

- 3.15 In order to mitigate against poor interviewing techniques in video-recorded evidence, the Home Office and the Department of Health issued guidance in the form of a Memorandum of Good Practice in 1992.¹⁴⁰ This guidance was updated and replaced in 2002 by *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, including children*¹⁴¹ and a further updated edition entitled *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures* was issued in September 2008. A memorandum was issued for use in Northern Ireland by the Northern Ireland Office and the Department of Health and Social Services (as it was then known) following the coming into operation of the Children's Evidence (Northern Ireland) Order 1995.¹⁴² Like its counterpart in England and Wales, it aimed at assisting interviewers who would normally carry out the video-recorded interviewing, providing them with guidelines covering technical considerations, child welfare, interview procedures and safe-keeping of the video. The memorandum was replaced in Northern Ireland by *Achieving Best Evidence in Criminal Proceedings (Northern Ireland): Guidance for Vulnerable or Intimidated Witnesses, including Children*¹⁴³ which was adapted for use in the jurisdiction by the Victims, Vulnerable and Intimidated Witnesses Steering Group¹⁴⁴ from the version published by the Home Office in England and Wales in 2002. This guidance has now been amended and updated, with the recent publication of *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures and the provision of pre-trial therapy*.¹⁴⁵
- 3.16 The consultation paper¹⁴⁶ gave details of the advice contained in the 2003 version of *Achieving Best Evidence* guidance in relation to interviewing both children and other vulnerable and intimidated witnesses. The importance of having suitably qualified interviewers is stressed, together with other personnel,

¹⁴⁰ Home Office, *Memorandum of Good Practice on Video-recorded Interviews with Child Witnesses for criminal proceedings* (London: Home Office, 1992).

¹⁴¹ Home Office, (London: Home Office, 2002).

¹⁴² Northern Ireland Office and Department for Health and Social Services, *Memorandum of Good Practice on Video-recorded Interviews with Child Witnesses for Criminal Proceedings* (Belfast: Northern Ireland Office and Department for Health and Social Services, 1997).

¹⁴³ Northern Ireland Office, (Belfast: Northern Ireland Office, 27 October 2003).

¹⁴⁴ This group was made up of representatives from the Northern Ireland Office, Police Service of Northern Ireland, Department of Health, Social Services and Public Safety, Vulnerable Adults Forum, Department for the Director of Public Prosecutions (as it was then known) and the Northern Ireland Court Service.

¹⁴⁵ Department of Justice, *Criminal Justice System Northern Ireland* (Belfast: Department of Justice, May 2011).

¹⁴⁶ At paragraphs 6.22 to 6.26.

who may include specialists from social services, interpreters, intermediaries, clinical psychologists, speech and language therapists and supporters who may offer emotional support. The guidance also suggests the involvement of a second interviewer whose role is to ensure that the interview is conducted in a professional manner, to identify gaps in the witness's account and to ensure that, in the case of a child, his best interests are kept paramount. The guidance also describes the four stages of the interview process: the "rapport" stage,¹⁴⁷ the "free narrative account",¹⁴⁸ the "questioning"¹⁴⁹ phase and "closure".¹⁵⁰ The 2011 guidance has not changed in this regard.

- 3.17 Video-recorded evidence has been used to a significant degree in criminal proceedings, particularly for children and people who are giving evidence in cases involving sexual offences. Children are automatically entitled to give evidence by video-recording, unless doing so is not in the interests of justice or the facility is not available in the district in which the court proceedings are to be held. However, the attitudes of practitioners towards video-recorded evidence have not been uniform.¹⁵¹ In the consultation paper, consultees were asked whether video-recorded evidence should be available as a special measure in civil proceedings.
- 3.18 Consultee responses were mixed. Whilst a number considered that inclusion of a special measure of this nature would be useful, particularly in relation to children who are required to give evidence, others shared the concerns of the Commission regarding the infrastructure required to support such a measure, such as the identification of persons who would carry out an interview, training of those persons and the provision of suitable equipment for producing good quality recordings. Another consultee was concerned that introduction of such a special measure could impact upon the timeliness of a court hearing and the cost of proceedings, especially if experts such as clinical psychologists and speech and language therapists are required in any particular case. Other consultees did support the introduction of video-recorded evidence, with one

¹⁴⁷ The stage during which the interviewer seeks to build a connection with the witness.

¹⁴⁸ The stage during which the interviewer adopts an "active listening" approach to encourage the witness to talk.

¹⁴⁹ The stage during which the interviewer asks open-ended or specific questions to encourage the witness to provide more information.

¹⁵⁰ The stage during which the interviewer makes every effort to ensure that the witness leaves the interview in a positive frame of mind and reviews the account given by the witness to ensure that there is a clear understanding of the information which the witness has provided.

¹⁵¹ See consultation paper at paragraph 6.27.

suggesting that the production of statutory guidance for practitioners would go some way to ensuring consistency of approach in interviewing techniques.

- 3.19 Having considered the views of consultees, the Commission has concluded that a special measure which allows for the video-recording of evidence-in-chief has limited use in civil proceedings. In criminal proceedings, interviews are carried out (often as part of the investigative process) by social workers or police officers, who are supported in this difficult task by their respective organisations. Civil proceedings, for the most part, do not have involvement by organisations of this nature. It is unrealistic to expect the representatives of parties to the proceedings to make arrangements for the video-recording of a witness's evidence. Not only would such an expectation require access to good quality video equipment, the representatives would also have to be fully trained in accepted interviewing techniques. Since most solicitor firms in Northern Ireland undertake civil matters of some description, it would be extremely costly to roll out training to all the individuals in these firms who carry out the work. Additionally, if practitioners were to carry out this function, it would be necessary to have some centrally organised body in place to ensure that standards in interviewing were set and evaluated, difficulties with individual performance identified and further training provided. Given these difficulties, the Commission does not consider that guidance alone would be sufficient to ensure consistency of approach, nor would it ensure that failures in performance are adequately managed.
- 3.20 The consultation paper noted that if it was inappropriate for legal representatives to have responsibility for the video-recording of evidence, then another source for providing this service would have to be identified. However, the Commission is still of the view that it is not immediately obvious as to which organisation could provide such a service. Furthermore, if such a service was to be set up from scratch, the costs would be significant. The Commission therefore considers that it is inappropriate to create a special measure which allows for the video-recording of a witness's evidence-in-chief in most civil proceedings.
- 3.21 There is, however, one limited area in which video-recording a witness's evidence-in-chief could be useful. This is in relation to some family proceedings, particularly in cases where children are to give evidence. At the time of the writing of the consultation paper, it was a rare occurrence that a child would

give evidence in either public or private family law proceedings. In fact, there was a presumption in law that they would not give evidence. However, this position has changed as a result of the decision by the Supreme Court in *W (Children)*.¹⁵²

W (Children)

3.22 On 3rd March 2010, the United Kingdom Supreme Court delivered a judgment which has a great deal of relevance to the Commission's current work on the vulnerable witnesses in civil proceedings project.¹⁵³ *W (Children)*¹⁵⁴ concerned the principles which should guide the exercise of a court's discretion in deciding whether to order a child to attend to give evidence in family proceedings.

3.23 Before *W (Children)*, the approach taken was one which was stated by Smith LJ in *LM v Medway Council, RM and YM*:¹⁵⁵

The correct starting point.....is that it is undesirable that a child should have to give evidence in care proceedings and that particular justification will be required before that course is taken. There will be some cases in which it will be right to make an order. In my view they will be rare..... the judge will have to balance the need for the evidence in the circumstances of the case against what he assesses to be the potential for harm to the child. In assessing the need for oral evidence... the judge should, in my view, take account of the importance of the evidence to the process of his decision about the child's future.¹⁵⁶

3.24 The approach taken by Smith LJ in *LM v Medway Council, RM and YM* was based upon the earlier authority of Butler-Sloss LJ in *R v B County Council, ex parte P*¹⁵⁷ and Wilson J in *Re P (Witness Summons)*¹⁵⁸ and it was endorsed by Wall and Thorpe LLJ in *SW v Portsmouth City Council; Re W (children: concurrent care and criminal proceedings)*.¹⁵⁹

¹⁵² [2010] UKSC 12.

¹⁵³ Unfortunately, this judgment was delivered whilst printing of the consultation paper was at an advanced stage, hence commentary on the judgment is contained in the final report.

¹⁵⁴ [2010] UKSC 12.

¹⁵⁵ [2007] EWCA Civ 9, [2007] 1 FLR 1698.

¹⁵⁶ At paragraphs 44 and 45 of the judgment.

¹⁵⁷ [1991] 1 WLR 221.

¹⁵⁸ [1997] 2 FLR 447.

¹⁵⁹ [2009] EWCA 644, [2009] 3 FCR 1.

- 3.25 In *W (Children)*, the facts of the case were as follows. Care proceedings under the Children Act 1989 had been initiated in respect of five children, four of whom were aged fourteen, eight, seven, three years and the fifth eighteen months old in June 2009, following allegations of sexual abuse against the father by the fourteen year old girl. All the children were eventually taken into foster care and at a case management hearing in September 2009, the parties to the proceedings had agreed that a fact finding hearing in relation to the sexual abuse allegations should take place. The local authority decided that the fourteen year old girl should not be called to give evidence by way of live television link, but instead her video-recorded evidence, which had been given under the *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* procedures should be used. The father objected to this course of action as he wished for the girl to be called to give evidence but the judge refused his application. The father duly appealed the decision of the judge and the Court of Appeal dismissed his appeal on 9th February 2010, on the basis of previous case-law such as the decision in *Medway*. The father then appealed the decision of the Court of Appeal and the matter came before the Supreme Court.
- 3.26 The Supreme Court took a differing approach to the previous case law. Lady Hale, in giving the judgment of the court, acknowledged the arguments against changing the law from a presumption that children should not give evidence in family proceedings, such as the trauma that giving evidence causes to a child or the risk that having to give evidence would be a deterrent to a child reporting allegations of sexual abuse. However, she considered that the existing law creates a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child, which cannot be reconciled with an attempt to strike a balance between Articles 6¹⁶⁰ and 8¹⁶¹ of the European Convention on Human Rights. Lady Hale took the view that striking the balance between Articles 6 and 8 in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases: that, however, is a result of deliberation, rather than a presumption or a starting point for deliberation.
- 3.27 In her judgment, Lady Hale commented that the family court would need to take a number of considerations into account when determining whether a child should give evidence in family proceedings of this nature. She stated that the

¹⁶⁰ Right to a fair trial.

¹⁶¹ Right to respect for private and family life.

court must factor in the steps which should be taken to improve the quality of the child's evidence whilst at the same time decreasing the risk of harm to the child. Additionally, she stated that it was important that the questions which challenge the child's account are fairly put to the child so that he can answer them, not that counsel should be able to question him directly.¹⁶² She suggested¹⁶³ using video-recorded cross-examination or cross-examination via video link, or the use of an intermediary.

- 3.28 Lady Hale determined that in private family proceedings, in principle, the same approach should be taken as in care proceedings. However, she warned that there were specific risks that the court must be alert to. Risks include any allegations of abuse that are made by a parent who may be seeking to gain an advantage over the other parent, together with considerations which arise as a result of the considerable number of litigants in person who appear in private family proceedings. If the court decides that justice cannot be done unless the child gives evidence, it would have to take very careful precautions to ensure that the child is not harmed by doing so.¹⁶⁴
- 3.29 The judgment concludes that children giving evidence in family proceedings should still be a rarity, but that result should be as a consequence of the exercise of the test to determine whether justice can be done to the parties without further questioning of the child, rather than as a starting point or a presumption.¹⁶⁵ The Commission does not wish to explore further the issue of when or in what circumstances a child should give evidence in family proceedings: that is a matter best left to the court hearing the particular facts of the individual case. However, the Commission does consider that the recommendations which it is making in relation to special measures in civil proceedings generally will be of benefit and utility for child witnesses who are called to give evidence in family proceedings.

Recommendation

- 3.30 Although the Commission does not see any merit in recommending that the video-recording of a witness's evidence is an appropriate special measure in all civil proceedings, it does see merit in recommending that this special measure should be available in private and public law proceedings taken under the

¹⁶² At paragraph 28 of the judgment.

¹⁶³ At paragraph 28 of the judgment.

¹⁶⁴ At paragraph 29 of the judgment.

¹⁶⁵ At paragraph 30 of the judgment.

Children (Northern Ireland) Order 1995. Although the practical out-workings of *W (Children)* are yet to manifest themselves, it is likely that more children will be giving evidence in family proceedings in the years to come. The Commission believes that this is most likely to happen in the most complicated and difficult of cases: in fact, the type of case where social services are involved either because the matters arising relate to public family law or because social worker involvement has been sought in private family law cases due to the complexity of the issues between the parties. It makes sense, therefore, to offer the children involved in these proceedings the greatest possible protection if they are called upon to give evidence. Social services personnel have both the skills base and the organisational support to facilitate video-recording the evidence of witnesses, although, obviously, if the repercussions of *W (Children)* result in a significant increase in demand on resources, then further investment will need to be made to meet the additional requirements. The Commission therefore considers that there should be an extra tier of protection available to children who are required to give evidence in proceedings under the Children (Northern Ireland) Order 1995. If this extra tier of protection is invoked, either as a result of an application to the court by a party or by the court's own motion, it will take effect instead of the protections for child witnesses which have been described elsewhere in this paper. Therefore, in any proceedings under the Children (Northern Ireland) Order 1995, child witnesses should be able to give video-recorded evidence-in-chief where it is considered by the court that the use of that special measure would be appropriate in all the circumstances of the case and where the admission of such evidence is in the interests of justice. It is envisaged by the Commission that this facility would be afforded in only the most serious of cases. In these cases, if use is made of video-recorded evidence-in-chief, an eligible child witness would have his cross-examination and re-examination conducted through live television link. If the court does not consider that video-recording should be used, then the usual regime recommended in this report for children's evidence should apply.¹⁶⁶ **The Commission therefore recommends that a special measure which allows for the video-recording of a witness's evidence-in-chief should only be made available on a limited basis, namely in relation to private law and public law proceedings taken under the Children (Northern Ireland) Order 1995.**

¹⁶⁶ See chapter 2 of this report.

LIVE TELEVISION LINK

- 3.31 Live television link has been a familiar feature of criminal proceedings in Northern Ireland since it was first introduced on a statutory basis by virtue of Article 81 of the Police and Criminal Evidence (Northern Ireland) Order 1989.¹⁶⁷ Article 81 allowed certain children and adults to give evidence by way of a television link in certain circumstances. A child could give evidence by way of live television link if he was in Northern Ireland and he was giving evidence in a variety of proceedings, such as in relation to a preliminary investigation or preliminary inquiry into a trial on indictment; a trial on indictment; an appeal to the Court of Appeal; proceedings in a magistrates' court; or an appeal from a decision of a magistrates' court. A child was able to benefit from the provision in a number of situations, including where the offence was an assault or a sexual offence. Adults, however, could benefit from live television link in a more limited way. Article 81 only offered adults this method of giving evidence if they were in Northern Ireland and would not give evidence otherwise than by live television link because they were in fear.¹⁶⁸
- 3.32 In the consultation paper, detail was provided in relation to evaluations of live television links which had been carried out in a variety of jurisdictions, including Australia, Scotland, England and Wales.¹⁶⁹ The conclusions drawn by these evaluations appear to suggest that a live television link is a useful alternative means to give evidence, especially for children.¹⁷⁰ One research study shows that witnesses who have used live television link to give their evidence were encouraged to do so by the availability of this special measure when they would otherwise have been reluctant to give evidence at all.¹⁷¹ The Australian Law Reform Commission's evaluation of the use of live television link by children in the Australian Capital Territory¹⁷² revealed that children who knew they could use a live television link when they wanted to do so were less anxious and more

¹⁶⁷ See paragraphs 2.7 – 2.9 of the consultation paper for discussion of the repeal status of Article 81.

¹⁶⁸ See paragraphs 2.7 and 2.17 of the consultation paper.

¹⁶⁹ Consultation paper at paragraphs 6.6 and 6.7.

¹⁷⁰ See, for example, Murray, *Live Television Link – An Evaluation of its use by Child Witnesses in Scottish Criminal Trials* (Edinburgh: The Scottish Office, 1995) and Ministry of Justice *Government Response to the Improving the Criminal Trial Process for Young Witnesses consultation* (London: Ministry of Justice, 25 February 2009).

¹⁷¹ Joyce Plotnikoff and Richard Woolfson, *In their own words* (London: NSPCC Publications, December 2004)

¹⁷² Australian Law Reform Commission, *Children's Evidence: Closed Circuit Television Report* 63 (1992).

effective in giving evidence than those who did not use the system even though they wished to do so.

- 3.33 Criticisms of the use of live television link as a method of evidence giving are generally in relation to: the cost; difficulties in assessing the demeanour and body language of the witness; poor technology; and failure of equipment.¹⁷³ The criticisms regarding assessment of witness demeanour tend to be made by legal practitioners: however, the experience in criminal courts appears to suggest that juries do not have a problem in dealing with evidence which is presented in this way. In any event, it appears to the Commission that this is an argument against using any form of alternative to oral evidence giving, rather than a criticism of live television link itself.

Consultation response

- 3.34 The consultation paper asked consultees to comment on whether they agreed with the Commission's provisional recommendation that all witnesses who are eligible for special measures in civil proceedings should be allowed to apply to the court for permission to give their evidence by live television link. All the consultees who responded to this question confirmed that they agreed with this provisional recommendation.
- 3.35 The consultees, whilst agreeing with the use of live television link, made various comments which have been helpful to the Commission's deliberations. One consultee suggested that it was likely that there would be few occasions when the more elaborate special measures such as live television link would be used. The Commission considers that it is difficult to assess potential usage, but there is a possibility, following the judgment of the Supreme Court in *W (Children)*¹⁷⁴ that with potentially more children giving evidence in family law cases, there may be more than a few occasions when such a special measure would be necessary. It is also possible that such a special measure would be very useful for victims of domestic violence who are seeking civil remedies through the courts. For example, in 2009, 63 cases under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 were disposed of in the Family Division of the High Court and 5246 cases in the Magistrates' Courts.¹⁷⁵ In 2008, 51

¹⁷³ See, for example, Ministry of Justice, *Government Response to the Improving the Criminal Trial Process for Young Witnesses consultation* (London: Ministry of Justice, 25 February 2009).

¹⁷⁴ [2010] UKSC 12.

¹⁷⁵ Northern Ireland Court Service, *Judicial Statistics 2009* (2009).

applications were disposed of in the High Court and 4734 were disposed of in the Magistrates' Courts.¹⁷⁶ It is unlikely that all or even most of these cases would require the use of live television link as a special measure, but the volume of court business suggests that there will be a need for, and usage of, this special measure.

- 3.36 Another consultee warned that it is important to make a proper assessment of the sufficiency of current equipment in the courts to ensure that short-comings in technology do not cause delay in the civil justice system. The Commission endorses this view. There is no point in having such remedies available on the statute book, if the infra-structure does not exist on the ground to enable the remedies to be used. Related issues were also raised by consultees. A number called for the provision of live television link between courts and other venues: one consultee considered that children should be able to be linked from their home to the court, whilst another saw merit in having a mobile unit which could operate on a province-wide basis. The Commission does not intend to make any comment on the provision of mobile equipment which could be used to link witnesses from a variety of locations to courts. This would certainly represent significant expenditure and is perhaps a matter best left for consideration by the appropriate authorities.
- 3.37 Some consultees made specific comments about the usefulness of live television link to witnesses. One consultee commented that this special measure may go some way in addressing the distress caused to women who have experienced domestic violence when they are cross-examined by the perpetrator of the alleged abuse, in cases where the perpetrator is representing himself in the proceedings. Another consultee noted that live television links are contemplated as one of a collection of measures in the *UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime 2009*.¹⁷⁷ A number of consultees with whom the Commission had face-to-face meetings reported that they had used live television link themselves in the course of criminal proceedings and had found it helpful.

¹⁷⁶ Northern Ireland Court Service, *Judicial Statistics 2008* (2008).

¹⁷⁷ Article 28(e)(iii).

Cost and functionality

3.38 The practical out-workings of providing for live television link in court proceedings will obviously have a financial cost attached to them. Witnesses are seated in a room separate from, but close to, the courtroom and they can see and be seen by the court with the aid of large television monitors which are linked to cameras. A two-way microphone link connects the room with the court so that the witness, lawyers and judge can communicate with one another. Because live television link facilities have been rolled out across Northern Ireland by the Northern Ireland Court Service to take account of the demand for special measures by witnesses in criminal proceedings, an infra-structure already exists within the court system in this jurisdiction. In the consultation paper,¹⁷⁸ a detailed breakdown of the availability of live television across the various court venues is provided. In total, twenty six courtrooms are equipped with the technology to fully meet the needs of the criminal justice system. The Commission suggests that an assessment would need to be carried out to ascertain whether or not this allocation of equipment would also meet the needs of the civil justice system and to determine the extra demand for live television link. It may well turn out that the existing distribution would be sufficient if careful listing of cases took place and numbers of witnesses seeking to use that equipment remain reasonably low. However, if this is not possible, there will need to be further investment in equipment for the courts, as well as rooms being set aside for witnesses to use. It is, of course, crucial that any equipment used is of high standard so that criticisms regarding performance of that equipment are avoided.

3.39 As well as civil courts, there are a number of tribunals which operate in Northern Ireland. The Commission does not envisage that the definition of civil proceedings which is used in this project would encompass these tribunals which often have their evidentiary rules contained within their statutory framework. However, there are a number of tribunals where it is conceivable that evidence may be given by people who would benefit from using special measures, for example, the Industrial and Fair Employment Tribunal. The Commission hopes that, if its recommendations are accepted by government and duly implemented, the appropriate authorities will give some consideration to amending existing provision for the use of live television link to include specific provision, based on the recommendations contained in this report,

¹⁷⁸ At paragraph 6.10.

which clearly states the circumstances in which witnesses are eligible to use this protection during proceedings before the various tribunals.

Recommendation

- 3.40 The Commission is aware of the possible costs associated with introducing a special measure like live television link into civil proceedings, however, the undoubted benefits of such a facility cannot be ignored. **The Commission recommends that live television link should be available as a special measure as it offers witnesses valuable protection when they are giving evidence, which, in turn, will increase witnesses' confidence in the civil justice system.**

VIDEO-RECORDED CROSS-EXAMINATION AND RE-EXAMINATION

- 3.41 In criminal proceedings in Northern Ireland, provision has been made under Article 16 of the Criminal Evidence (Northern Ireland) Order 1999 for certain witnesses to give their evidence during cross-examination and re-examination by way of video-recording if they have given their evidence-in-chief by way of video-recording. However, this provision has never been brought into force. The corresponding provision in England and Wales¹⁷⁹ has not been brought into operation either, although there has been a commitment from Government to implement this special measure subject to the successful development of rules of procedure and practitioner guidance.¹⁸⁰ In the consultation paper, the Commission considered that since this particular special measure was inter-linked with pre-recorded evidence-in-chief, it would not take any preliminary view until it had heard the views of consultees.
- 3.42 In the event, consultees did not comment specifically on the issues raised by the inclusion of this special measure, although one consultee indicated agreement with the Commission's view that this special measure is linked with the measure which allows for a witness's evidence to be pre-recorded.
- 3.43 Given the lack of consultation response and the fact that this type of special measure has yet to be successfully implemented in criminal proceedings, the Commission considers that it would be unwise at this point to recommend that

¹⁷⁹ Section 28 of the Youth Justice and Criminal Evidence Act 1999.

¹⁸⁰ Ministry of Justice, *Government response to the improving the criminal trial process for young witnesses consultation* (London: Ministry of Justice, 25 February 2009).

video-recorded cross-examination and re-examination is made available for eligible witnesses in civil proceedings. However, given the possible repercussions of the decision in *W (Children)*¹⁸¹ it may be prudent to reconsider this position if any change occurs in the criminal context.

USE OF INTERMEDIARIES

3.44 An intermediary is a third party who may act as a “go-between” to facilitate communication between a vulnerable witness and the court.¹⁸² Broadly speaking, an intermediary will explain questions which are put to the witness, perhaps using simpler language which the witness is able to understand. The intermediary may then explain the witness’s answers to the questions for the benefit of the court, so that the information which the witness wants to relay is understood.

3.45 In the consultation paper,¹⁸³ the Commission examined the controversies which surround the issue of intermediaries. In New Zealand, intermediaries were rejected as a result of divided views expressed by the legal professions and concerns about the effectiveness of communicating a witness’s answers. However, in criminal proceedings in Northern Ireland,¹⁸⁴ England and Wales,¹⁸⁵ the use of intermediaries was included as a possible special measure for eligible witnesses, although the relevant provision in Northern Ireland is yet to be commenced. In Scotland, intermediaries are not specifically included in the Vulnerable Witnesses (Scotland) Act 2004, but that legislation allows for Scottish Ministers to make secondary legislation for the creation of additional special measures.¹⁸⁶ The Scottish Government consulted on the possible use of intermediaries in Scotland in October 2007,¹⁸⁷ and published its analysis of consultation responses in August 2008.¹⁸⁸ The analysis did not reveal any consensus amongst consultees and no further action has been taken to date.

¹⁸¹ [2010] UKSC 12.

¹⁸² Definition taken from the Scottish Government’s *Consultation on the use of intermediaries for vulnerable witnesses in Scotland* (15 October 2007) at p1 (www.scotland.gov.uk).

¹⁸³ At paragraphs 6.32 to 6.40.

¹⁸⁴ Article 17 of the Criminal Evidence (Northern Ireland) Order 1999.

¹⁸⁵ Section 30 of the Youth Justice and Criminal Evidence Act 1999.

¹⁸⁶ Section 271 H of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004 in relation to criminal proceedings: section 18(1)(e) in respect of civil proceedings.

¹⁸⁷ Scottish Government, *Consulting on intermediaries as a special measure for vulnerable witnesses in Scotland* (15 October 2007) (www.scotland.gov.uk).

¹⁸⁸ Scottish Government, *Consulting on intermediaries as a special measure for vulnerable witnesses: the use of intermediaries for vulnerable witnesses in Scotland: report on the analysis of responses to the consultation* (August 2008) (www.scotland.gov.uk).

- 3.46 The Commission asked consultees to consider whether intermediaries should be made available to eligible witnesses in civil proceedings. The majority of consultees who responded to the question considered that there was merit in including the use of intermediaries as a special measure in civil proceedings for those witnesses who may benefit from such assistance. However, a number of consultees qualified their support for such a measure by cautioning that there is a need to ensure that any person acting as an intermediary in civil proceedings should be properly trained¹⁸⁹ in the skills required to carry out the role effectively. One consultee, who was cautious about the use of intermediaries due to the current lack of implementation of this measure in criminal proceedings, suggested that more research should be carried out to examine the pros and cons of this special measure prior to any introduction in the civil courts. Another consultee was sceptical, but acknowledged that there were some benefits in favour of intermediaries. Other consultees were more encouraging of the introduction of intermediaries in civil proceedings. One consultee considered that the introduction of such a measure had great potential to overcome a significant amount of the difficulties for child witnesses in providing their best evidence in court, while another considered that the measure did not go far enough, suggesting that appropriately trained and qualified disability advocates could greatly assist a person with a disability to participate in a meaningful way in court proceedings.
- 3.47 On balance, the Commission considers that the use of intermediaries in civil proceedings would be of benefit to certain witnesses who require specialist assistance to understand and to be understood during court proceedings. However, care must be taken to ensure that intermediaries are fully trained and that their methods are efficacious and based firmly on scientific evidence. Although in the consultation paper,¹⁹⁰ caution was sounded by the Commission in relation to a method known as “facilitated communication”, particularly in light of comments made about the practice by Dame Butler-Sloss in *Re D (Evidence: Facilitated Communication)*,¹⁹¹ the Commission is encouraged by the use of intermediaries in criminal proceedings in England and Wales. An evaluation was carried out between March 2004 and March 2006¹⁹² on six “pathfinder”

¹⁸⁹ One consultee stated that he considered that the role of intermediary should be carried out by someone who is familiar with the witness’s background.

¹⁹⁰ At paragraphs 6.37 to 6.40.

¹⁹¹ [2001] 1 FLR 148.

¹⁹² Joyce Plotnikoff and Richard Woolfson, *The “Go-Between”: evaluation of intermediary pathfinder projects* (London: Ministry of Justice, 2007).

projects¹⁹³ which were set up to examine the introduction of intermediaries in criminal courts, with the aim of establishing a model for national implementation. There were a number of difficulties identified with the implementation of the projects, namely:

- Difficulty in identifying eligible witnesses – the number of referrals for intermediaries were low and it was considered that this was not a reliable guide to potential demand;
- Misunderstanding of the intermediary role;
- Lack of planning - this may have diminished the intermediary's ability to facilitate communication at trial;
- Lack of appropriate intervention in questioning – intermediaries' relatively narrow remit to intervene is confined to facilitating communication.

3.48 Despite these problems, a range of benefits were identified by the evaluation. It was reported that feedback from witnesses and carers in trial cases was uniformly enthusiastic, with carers considering that intermediaries not only facilitated communication but also helped witnesses cope with the stress of giving evidence. Appreciation of the role was also almost unanimous across the judiciary and other criminal justice personnel in pathfinder cases.

3.49 Other benefits were also apparent. These included:

- Potential assistance in bringing offenders to justice – 13 cases (involving 15 witnesses for whom intermediaries were appointed) ended in a conviction, five after trial;
- Increasing access to justice – participants in the pathfinder projects estimated that, in their opinion, at least half of 12 trial cases would not have reached trial without the involvement of an intermediary;
- Potential cost savings – it was considered that the use of an intermediary had the potential to save court time by keeping witnesses focused, reducing the time that might otherwise have been needed to question them;
- Benefits at trial – participants reported a number of benefits during the trial stage, including: facilitating communication in a neutral way, through informative reports and appropriate interventions; and ensuring that witnesses understood everything said to them, including explanations and instructions.

¹⁹³ These pathfinder projects took place in Merseyside, West Midlands, Thames Valley, South Wales, Norfolk and Devon and Cornwall.

- 3.50 On the basis of this evaluation, a decision was taken in England and Wales to roll-out the use of intermediaries on a national basis, although the evaluation recommended that a five-point agenda be followed to ensure that the pitfalls encountered during the pathfinder projects were avoided. It was suggested that:
- Central guidance should be provided, together with a clear allocation of local responsibility for implementation;
 - Links between implementation of the special measure and other initiatives should be highlighted;
 - Awareness raising needed to take place amongst the criminal justice community and “mind-set” obstacles to intermediary use should be tackled;
 - Eligible witnesses should be identified at the earliest opportunity; and
 - Improvements should be made to pre-trial planning and it should be ensured that ground rules for intermediary use were discussed before trial.
- Full roll-out of the use of intermediaries in criminal proceedings in England and Wales was achieved in 2008.¹⁹⁴
- 3.51 The Commission is also encouraged by the knowledge that it is intended to roll out the use of intermediaries in Northern Ireland in criminal proceedings, as well as extending the facility to vulnerable defendants.¹⁹⁵ It will be important to learn from the experience of rolling out this special measure in criminal proceedings in Northern Ireland. If a cadre of qualified practitioners is identified as suitable for criminal proceedings, the Commission feels confident that it is possible to use this knowledge base to benefit witnesses in civil proceedings who may experience communication difficulties whilst giving evidence in court. In order to provide greater clarity regarding the use of intermediaries, the Commission considers that there would be merit in court rules or secondary legislation being produced which would offer assistance in relation to the role and function of intermediaries. Such provision is made in the draft legislation which is attached to this report.
- 3.52 The Commission recognises that there will be cost implications for this type of special measure in civil proceedings in Northern Ireland. However, if a suitable group of qualified individuals is identified during the process of making this special measure available to eligible witnesses in criminal proceedings, then the

¹⁹⁴ Joyce Plotnikoff and Richard Woolfson, *Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (London: National Society for the Prevention of Cruelty to Children, July 2009) p14.

¹⁹⁵ This measure is included in the Justice Act (Northern Ireland) 2011. See particularly Department of Justice, *Equality Impact Assessment for a proposed Justice Bill (NI) 2010* (August 2010).

costs of accrediting these individuals for civil cases will not be an issue. The main cost will be in relation to paying these experts for their time spent in preparation and in court. Although this cost is unlikely to be negligible, it must be set against the importance of enabling witnesses to play a full part in the justice system. It is impossible to assess exactly how many witnesses would need to seek the assistance of an intermediary in civil proceedings every year, but the numbers are likely to be very low, especially if those witnesses can access other types of special measures which may prove to be effective in meeting their needs. In light of these considerations and subject to this measure being successfully implemented in criminal proceedings in Northern Ireland, **the Commission recommends that the use of intermediaries is included as a special measure in civil proceedings in Northern Ireland.**

AIDS TO COMMUNICATION

- 3.53 Under Article 18 of the Criminal Evidence (Northern Ireland) Order 1999, the court may authorise the use of communication aids to help witnesses overcome difficulties whilst being asked or whilst answering questions. Witnesses who are seeking special measures under Article 4 of that Order, that is to say: children; people who are living with a mental disorder or significant impairment of intelligence and social functioning; or those living with a physical disability or disorder, can seek to use communication aids. For example, this type of special measure may be sought by someone who experiences difficulties in listening or talking because of a hearing impairment, a voice disorder or aphasia.¹⁹⁶
- 3.54 In the consultation paper, the Commission described alternatives to verbal communication that are routinely used to assist people who may experience difficulties with speech. “Augmentative” communication includes methods which support verbal speech, whilst “alternative” communication is the collective description of methods of communication which take the place of speech. Augmentative communication may include, for example, sign language when used to augment speech or gestures and body language, such as nodding and pointing. Alternative communication may include the use of sign boards or

¹⁹⁶ Aphasia (or dysphasia) is a condition which causes an individual to experience difficulties in communicating because the communication areas of the brain are damaged, for example, by stroke, head injury or tumours (www.speechdisorder.co.uk).

special computers which will enable a witness, for example, to make use of an artificial voice where he has lost the power of speech.¹⁹⁷

3.55 The Commission had indicated in the consultation paper that it was of the preliminary view that aids to communication should be included as a special measure in civil proceedings for witnesses who may need to use them. Consultees were asked whether they agreed with that provisional view. Consultees who answered the question were unanimous that this special measure should be made available to eligible witnesses in civil proceedings. However, a number of consultees questioned whether this facility should be delivered as a reasonable adjustment under the Disability Discrimination Act 1995, rather than as a special measure. The Commission has considered this view and has come to the conclusion that although there is merit in this approach, including aids to communication in a scheme of special measures has the benefit of ensuring that all assistance to witnesses in civil proceedings are contained in one piece of legislation, as well as the benefits of ensuring that these aids are given a clear statutory presence.

3.56 Given that the Commission's initial view on the issue has been endorsed by the views expressed by consultees, **the Commission recommends that aids to communication should be included as a special measure for witnesses in civil proceedings who may need them.**

SUPPORTERS AND OTHER MEASURES

3.57 In Scotland¹⁹⁸ and New Zealand,¹⁹⁹ "supporters" have a legislative basis for attending court with a witness in order to provide support. In England and Wales, section 102 of the Coroners and Justice Act 2009 makes provision for witnesses to be accompanied by a supporter whilst giving their evidence by live television link in criminal proceedings. This provision has been replicated for criminal proceedings in Northern Ireland,²⁰⁰ thus putting on a statutory footing

¹⁹⁷ See www.speechdisorder.co.uk for more information. This is a website designed to offer a reference point for people with speech disorders. See also www.isaac-online.org, the website of the International Society for Augmentative and Alternative Communication; and www.communicationmatters.org.uk, the UK chapter of ISAAC.

¹⁹⁸ Section 22 of the Vulnerable Witnesses (Scotland) Act 2004.

¹⁹⁹ Section 79(2) of the Evidence Act 2006.

²⁰⁰ Section 10 of the Justice Act (Northern Ireland) 2011. See also Department of Justice, *Summary of responses to the consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings* (Belfast: Department of Justice, September 2010).

an element of the service which is currently being provided by Victim Support Northern Ireland and the National Society for the Prevention of Cruelty to Children by virtue of the Partnership Protocol between Victim Support Northern Ireland, the National Society for the Prevention of Cruelty to Children and the Northern Ireland Courts and Tribunals Service.²⁰¹

- 3.58 Although the proposed changes to the criminal legislation in Northern Ireland which are contained in the Justice Act (Northern Ireland) 2011²⁰² will give a statutory basis for supporters being present in live television link rooms, these changes do not go as far as the legislative position in Scotland, for example. In Scotland, supporters have a more wide-ranging role and are not just limited to accompanying a witness in a live link room. In the consultation paper, consultees were asked whether they saw merit in including the use of supporters as a special measure in civil proceedings.
- 3.59 All the consultees who responded to this question considered that supporters should be made available to witnesses in civil proceedings, some suggesting that supporters would be of greatest use in cases involving children, anti-social behaviour or domestic violence. Moreover, a number of consultees envisaged that such a measure would be available not only to witnesses who were required to give evidence by live television link, but to any witnesses who are required to attend court in much the same way as the support being currently provided by Victim Support, the National Society for the Prevention of Cruelty to Children and Northern Ireland Courts and Tribunals Service in the criminal courts in Northern Ireland.²⁰³ No such scheme is currently in existence for civil proceedings. Consultees also mentioned that they considered that the role of supporter was one which required specific training and skills, a view with which the Commission would concur.
- 3.60 The Commission considers that there is merit in recommending that suitably qualified supporters should be allowed to accompany witnesses who are giving evidence by way of live television link in civil proceedings. The Commission is also attracted to the idea of allowing supporters to offer a wider range of services, along the lines of those offered in the criminal context by Victim Support, NSPCC and Northern Ireland Courts and Tribunals Service. This

²⁰¹ *Partnership Protocol Victim Support, Witness Service NSPCC and Northern Ireland Court Service* (Revised June 2008) www.courtsni.gov.uk.

²⁰² Not yet commenced as at the date of the publication of this report.

²⁰³ See consultation paper paragraph 6.44 for further discussion.

would mean that a trained supporter would accompany a vulnerable or intimidated witness in court to assist him to deal with the experience of attending court and giving evidence. It would obviously be important that the conduct of supporters is carefully regulated. This would be easier to achieve if particular bodies or groups rather than individuals such as friends or family members were to provide the supporter service: the *Partnership Protocol Victim Support, Witness Service, NSPCC and Northern Ireland Court Service*²⁰⁴ contains an excellent model of a code of conduct which covers a variety of areas, including the requirement to have undergone accredited training, conflicts of interest, confidentiality, conduct in court and the management of the relationship with the witness.

- 3.61 Rolling out this wider role for supporters in civil courts would have an undoubted financial impact, though it should be noted that the Victim Support Witness Service which operates within the criminal courts is provided to a certain extent by trained volunteers, whilst the NSPCC service for children is provided by social work staff and trained volunteers. It may well be that it is most cost effective to extend the current services to civil courts. It should also be noted that in family proceedings, the position is helped to a degree by the availability of Guardians ad Litem in public law cases and the Official Solicitor, although at the present time, their role goes well beyond support and enters the field of representation. The Commission does not consider that it is best placed to devise a suitable scheme for the delivery of a supporter service: that is best left for those in government who may choose to implement the recommendations made in this report.
- 3.62 **The Commission therefore recommends that witnesses who are to give their evidence by way of live television link in civil proceedings should be able to avail of the services of a suitably trained supporter in the live television link room. The Commission also recommends that government should give consideration to creating a scheme which allows all vulnerable and intimidated witnesses in civil proceedings to utilise the services of supporters.**

²⁰⁴ Available on www.courtsni.gov.uk.

Other measures

3.63 The consultation paper asked consultees whether they considered that any other type of special measure should be made available to witnesses in civil proceedings. A variety of suggestions were made. A number of consultees considered that press reporting should be restricted in the interests of protecting the witness. However, the Commission considers that the issue of reporting court proceedings is a matter which is inextricably and fundamentally linked to the transparency and accountability of the justice system and therefore falls outside the remit of the current project. Other consultees made suggestions which, whilst not necessarily being suitable for adoption as special measures, nevertheless could be taken forward by administrative means. For example, it was suggested that processes and technical terminology could be explained to witnesses.²⁰⁵ The issue of the provision of continuing training on diversity and equality for the judiciary and legal representatives was also raised. Other consultees suggested very practical considerations to be taken into account when children are required to give evidence, such as allowing breaks.²⁰⁶ Other consultees suggested that making snacks available and providing entertainment such as DVDs whilst waiting to go into court would be useful for children. The Commission considers that these are matters best left to those who have responsibility for the operation of the courts in Northern Ireland and does not, therefore, intend to make any recommendations regarding these suggestions.

²⁰⁵ One consultee suggested that videos or DVDs be provided to explain how the court works.

²⁰⁶ One consultee suggested allowing smoking breaks.

CHAPTER 4. RELATED ISSUES

4.1 In the consultation paper, the Commission asked consultees to consider a number of issues which are related to witnesses giving evidence in civil proceedings. One of these issues was witness anonymity, in particular, the implications for the law following the decision in *R v Davis*.²⁰⁷ Another was the law relating to the competence of witnesses to give evidence in civil proceedings.

WITNESS ANONYMITY

4.2 Although giving evidence orally in person is the usual method of giving evidence in any court proceedings, other methods have been devised to offer protection to certain witnesses, for example, the special measures under the Criminal Evidence (Northern Ireland) Order 1999 which are the focus of the Commission's project. However, there may be some witnesses who so greatly fear reprisals as a consequence of giving evidence that they seek to hide their identities whilst in court. This use of anonymity in court proceedings is highly contentious and has been the subject of a variety of cases brought before both the domestic courts in the United Kingdom and the European Court of Human Rights. Most recently, "emergency" legislation²⁰⁸ was brought before the Westminster Parliament to deal with the outcome of one such case, *R v Davis*, which was decided by the House of Lords on 18th June 2008.

4.3 It has been a long established principle of the common law that an accused person in a criminal trial should be able to confront his accusers so that he can cross-examine them and challenge the evidence that they bring against him. Part of this principle is the expectation that an accused person will know the identity of his accusers, as this often has great bearing on his ability to challenge the evidence. However, there are departures from this general principle. One such departure arose in the case of *R v Murphy and another*²⁰⁹ following the trial of two defendants in Belfast, who had been accused and convicted of murdering two army corporals. At trial, evidence for the prosecution was given by a number of television journalists who had, in the course of their work, filmed the scene of the killing. The trial judge had allowed these

²⁰⁷ [2008] UKHL 36.

²⁰⁸ Criminal Evidence (Witness Anonymity) Act 2008, which was replaced by provisions contained in the Coroners and Justice Act 2009.

²⁰⁹ [1990] NI 306.

witnesses to give evidence without being identified by name; they were permitted to testify from behind a screen, out of the view of the defendants and the public. On appeal against the resulting conviction, the Court of Appeal upheld the trial judge's decision. On further appeal to the House of Lords, the Law Lords considered that the case was a small departure from the principle: the defence had not objected to the anonymising of the witnesses, nor did it challenge the suggestion that the witnesses feared for their safety. It was also considered that the evidence given by the journalist did not implicate the defendants in the commission of the crime; furthermore, the credibility of the witnesses was not in issue.

- 4.4 Other cases have also involved the anonymity of witnesses,²¹⁰ such as *R v Brindle and Brindle*,²¹¹ *R v Watford Magistrates' Court, ex parte Lenman*,²¹² *R v Taylor and Crabb*²¹³ and *R(Al-Fawwaz) v Governor of Brixton Prison*.²¹⁴ This issue has also been considered at length in the context of the provisions of the Inquiries Act 2005, particularly in the case of *In re Officer L (Respondent) (Northern Ireland)*²¹⁵ which looked at witness anonymity in light of common law principles and section 19 of the Inquiries Act 2005, which provides for the imposition of restrictions on public access to proceedings or the disclosure or publication of any evidence or documents.

R v Davis

- 4.5 The case of *R v Davis* itself arose from the fatal shooting of two men at a New Year's Eve party in a flat in Hackney in 2002. Davis was convicted of both murders on 25th May 2004 and he subsequently appealed against the conviction. One of the grounds of his appeal was the use of witness anonymity in the proceedings, as the three witnesses who gave evidence which identified Davis as the gunman had been granted anonymity. The Court of Appeal

²¹⁰ See consultation paper at paragraphs 7.4 – 7.6.

²¹¹ Unreported, 31 March 1992.

²¹² [1993] Crim LR 388.

²¹³ Unreported, 22 July 1994, Court of Criminal Appeal Division.

²¹⁴ [2001] UKHL 69.

²¹⁵ [2007] UKHL 36. These proceedings arose from the Robert Hamill Inquiry: an inquiry set up in November 2004 to examine the circumstances surrounding the death of Robert Hamill, who died on 8 May 1997 from injuries received during an affray in Portadown, County Armagh in the early hours of 27 April 1997. The remit of the Inquiry was to “inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations.”

dismissed his appeal,²¹⁶ with the judges holding that there was a clear jurisdiction at common law to admit incriminating evidence against a defendant tendered by anonymous witnesses and that a conviction was not unsafe simply because the evidence of an anonymous witness might be decisive in the outcome of the trial. The House of Lords therefore had to consider whether it was permissible for a defendant to be convicted in circumstances where the conviction was based solely or to a decisive extent upon the testimony of one or more anonymous witnesses.

4.6 During Davis' trial, the three witnesses each gave their evidence under a pseudonym and their addresses and personal details were withheld from Davis and his legal advisors. Davis's legal representatives were not permitted to ask the witnesses any questions which might enable them to be identified. The witnesses also gave evidence behind screens so that they could be seen by the judge and jury, but not by Davis. Their natural voices were heard by the judge and jury, but Davis and his legal team could only hear the witnesses after their voices had been mechanically distorted. The House of Lords was asked to consider whether these protective measures were lawful and what effect these measures had on the fairness of Davis's trial. The Law Lords were unanimously of the opinion that the conviction of Davis was unsound and allowed his appeal. Their main concerns centred around the unsound development of domestic case-law in the area of anonymous witnesses and questions over its compatibility with the European Convention on Human Rights.²¹⁷

4.7 The decision in *R v Davis* caused significant concern in the criminal justice community as it effectively restricted the use of anonymous evidence in criminal proceedings. There are no statistics available in relation to the use of anonymity in criminal trials, but it has been suggested that the practice is commonplace²¹⁸ and is used in more than half of all murder trials.²¹⁹ Other sources have stated that the use of anonymity occurs to a much lesser degree.²²⁰ Whatever the reality, the Government identified a defect in the law and acted quickly to rectify it by introducing the Criminal Evidence (Witness Anonymity) Bill on 3 July 2008

²¹⁶ *R v Davis, R v Ellis and others* [2006] 1 W.L.R 3130.

²¹⁷ For further discussion, see consultation paper paragraphs 7.9 – 7.12.

²¹⁸ Lord Neill of Bladen, HL Deb 26 June 2008 c1607.

²¹⁹ *The Independent*, 'How anonymous witnesses saw justice done' (25 June 2008); *The Times*, 'The erosion of a basic right' (25 June 2008).

²²⁰ Lord Hunt of King's Heath suggested that he suspected that only a small proportion of the 1.5 million cases that go through the courts every year are affected, HL Deb 26 June 2008 c1603.

under emergency procedures. The Bill was passed by Parliament and received Royal Assent on 21 July 2008, coming into force on that same date.²²¹

- 4.8 The provisions of the Criminal Evidence (Witness Anonymity) Act 2008 were deemed to be so controversial, due to their nature and due to the use of the emergency procedures through which the Act was brought on to the statute book, that the legislation was subject to a “sunset” clause: that no witness anonymity order could be made under the Act after 31 December 2009, subject only to possible extension by the Secretary of State.²²² This provision had the effect of requiring the Government to review and re-enact the law, giving Parliament another opportunity to consider the issues. The Coroners and Justice Act 2009 re-enacts the Criminal Evidence (Witness Anonymity) Act 2008 with a number of modifications, which are mainly technical in nature.²²³
- 4.9 Although *R v Davis* caused much concern in the criminal justice community and much urgency within Government and Parliament, there has been no such reaction to the repercussions of the case in relation to civil proceedings. In the consultation paper, the Commission noted that there is an arguable case that the common law relating to witness anonymity in civil proceedings, post *Davis*, faces some confusion. The case casts doubt on the ability of the common law to depart from the principle of the right to confront, except in minor circumstances. With a lack of statutory intervention, it is likely that cases such as *R v Murphy*, (where anonymity was not objected to), and *Julie Doherty (suing as personal representative of Daniel Doherty deceased) v Ministry of Defence*²²⁴ remain the sources of the current law in civil proceedings in Northern Ireland. This position is removed from the current status of the criminal law and after *Davis*, it is unlikely that the common law can evolve to breach the gap.
- 4.10 It is unlikely that witness anonymity will be sought with as much frequency in civil proceedings as it is in criminal proceedings. In most civil proceedings, the identity of the parties will be known by the parties, for example in family cases or in personal injury cases. However, there may be a small number of cases

²²¹ See consultation paper paragraphs 7.14 – 7.17 for further discussion of the content of the Criminal Evidence (Witness Anonymity) Act 2008.

²²² Section 14.

²²³ See consultation paper paragraph 7.18 for further discussion.

²²⁴ Unreported, Northern Ireland Court of Appeal (5 February 1999). In this case, there was an adherence to the principle that evidence that is directly detrimental to a party’s case should not be given anonymously and that unimpeded cross-examination plays a vital role in the trial and gives vital assistance to the due administration of justice.

where it will be sought: it is not inconceivable, for example, that anonymity would be sought in some cases brought under the provisions of the Anti-social Behaviour (Northern Ireland) Order 2004.²²⁵

- 4.11 In the consultation paper, the Commission acknowledged that there was undoubtedly an argument that the law on witness anonymity in civil proceedings lags behind its criminal counterpart and its progress by way of evolution by case-law may have effectively been curtailed by *Davis*. The Commission, however, recognised that it is more difficult to assess whether there is an actual *need* for the civil law relating to witness anonymity to catch up with the criminal law. Consultees were asked for their views in relation to this matter.
- 4.12 The majority of consultees considered that there was merit in reconsidering the law relating to witness anonymity in civil proceedings, expressing views that it may be necessary in cases involving anti-social behaviour and cases where personal information, such as sexual orientation, were at issue. However, no real strong or persuasive arguments were received as a result of the consultation exercise, nor was any evidence presented that there was an actual need to act to reform the law at the current time.
- 4.13 The Commission has carefully considered its options in relation to making recommendations on witness anonymity in civil proceedings. There appear to be three main options available. First, the Commission could explore the possibility of replicating the criminal law regime in the civil context. Second, the Commission could recommend that no change is needed, therefore allowing the law to remain as it is at present. Third, the Commission could choose a “wait and see” approach, which would require no immediate action but would also necessitate the monitoring of the current law, both in the criminal and civil context, in order to ascertain whether any change is needed in the future.
- 4.14 On balance, the Commission has concluded that the third approach is the correct one to take at the present time. The Commission is not persuaded that there is a pressing mischief to be remedied in the law at present and given that the provisions contained in the Coroners and Justice Act 2009 are still in their infancy, it may be a mistake to rush to attempt to replicate them. The Commission considers that it is more prudent to allow the criminal law regime to

²²⁵ It should be noted that Theresa May, Home Secretary and Minister for Women and Equality, announced a review of anti-social behaviour powers available to police in a speech *Moving Beyond the ASBO* which was delivered on 28 July 2010.

settle in and for case-law to build up. In any event, it may well be that the implementation of special measures in civil proceedings may go some way to assisting a witness who would wish to seek anonymity whilst giving evidence. Therefore, the Commission does not intend to make any recommendations in relation to witness anonymity at this time.

COMPETENCE OF WITNESSES IN CIVIL PROCEEDINGS

- 4.15 In order to give evidence in court, a witness must be competent to do so. The current law which determines the competence of a witness to give evidence is not the same in civil proceedings as it is in criminal proceedings. In criminal proceedings in Northern Ireland, by virtue of Article 31(1) of the Criminal Evidence (Northern Ireland) Order 1999, all persons (whatever their age) are competent to give evidence. However, a person is not competent to give evidence if it appears to the court that he cannot understand questions put to him as a witness and give answers to those questions which can be understood.²²⁶ A person can give evidence on oath if he is fourteen years old or over and has sufficient appreciation of the solemnity of the occasion and the particular responsibility to tell the truth which is involved in taking an oath.²²⁷ If no evidence to the contrary is produced, a person will be presumed to have sufficient appreciation if he can give intelligible testimony²²⁸ that is to say, he can understand questions put to him and give understandable answers.²²⁹ A person can give unsworn evidence if he is competent to give evidence but does not meet the tests for giving sworn evidence, in other words, he is under the age of fourteen and he does not have sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth that is involved in taking an oath. If a question of competence arises, the party who has called the witness must satisfy the court that, on the balance of probabilities, the witness is competent to give evidence.²³⁰
- 4.16 In civil proceedings, section 2 of the Evidence Act 1851 provides that any party and their witnesses shall be competent to give evidence. There are exceptions to this general principle. A child who is of such tender years that he has neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking

²²⁶ Article 31(3).

²²⁷ Article 33(2).

²²⁸ Article 33(3).

²²⁹ Article 33(8).

²³⁰ Article 32(2).

the truth is incompetent.²³¹ The competence of people living with a mental disorder is determined by *R v Hill*,²³² which states that such people can give evidence if the judge is satisfied that the person is, at the relevant point in time of sufficient understanding to give rational evidence. A person who is deaf and cannot speak and who is unable to use signs in order to communicate or write is incompetent to give evidence.²³³ Also, a person who does not appreciate the nature of an oath or affirmation is deemed to be incompetent. The modern interpretation of this final exception focuses on whether a witness has sufficient appreciation of the solemnity of the occasion and the importance to tell the truth, rather than being determined by whether he is aware of the divine sanction of the oath.²³⁴

- 4.17 In relation to children, Article 169(4) of the Children (Northern Ireland) Order 1995 allows a child to give evidence, even if, in the opinion of the court, he does not understand the nature of the oath as long as he understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence that is being tendered. If a question arises about the competence of a witness, preliminary questioning or testing of the witness will take place to determine whether he is competent to give evidence to the court. If the witness has been sworn and has given evidence before a question of competence arises, his evidence can be objected to, tested and rejected.²³⁵
- 4.18 A further, statutory, provision in relation to civil proceedings exists which has relevance to the issue of the competence of witnesses to give evidence in civil proceedings. Section 6(2) of the Civil Evidence (Northern Ireland) Order 1997 provides that the hearsay evidence of people suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings is inadmissible as evidence.

The law in Scotland

- 4.19 The law is different in relation to the competence of witnesses to give evidence in civil proceedings in Scotland: section 24 of the Vulnerable Witnesses (Scotland) Act 2004 totally abolishes any test for competence for all witnesses

²³¹ *R v Brasier* (1779) 1 Leach 199.

²³² (1851) 2 Den 254.

²³³ *Dickenson v Blisset* (1754) 1 Dick 268; *R v Whitehead* (1866) LR 1 CCR 33; *R v Imrie* (1917) 12 Cr App Rep 282, CCA.

²³⁴ *R v Hayes* [1977] 2 ALL ER 288; *R v Bellamy* (1985) 82 Cr App R 222.

²³⁵ *Jacobs v Layborn* (1843) 11 M & W 685; *R v Whitehead* (1866) LR 1 CCR 33.

in civil and criminal proceedings. This effectively has the result that any witness can give evidence without his competence first being ascertained: the weight or significance of that evidence then has to be assessed by the judge and the jury (if there is one).

Reform?

- 4.20 Since the Commission is recommending that special measures are to be adopted for witnesses who are required to give evidence in civil proceedings, the law regarding the witnesses' competence to give that evidence must be addressed. Putting in place special provision to encourage and assist certain categories of witness to give evidence in court does not sit well with a body of law which may prevent that witness from giving evidence because he may not appreciate the importance of the oath or affirmation or the solemnity of the occasion due to a characteristic which made him eligible for special measures in the first instance.
- 4.21 In the consultation paper, the Commission identified a number of options which could be taken in relation to the law on competence to give evidence in civil proceedings. First, the law could stay as it is at present. Second, the law could be amended, so that the current position is updated to reflect the criminal model in Northern Ireland which is based on the understanding of the witness and his ability to give understandable answers. A distinction could then be drawn between those witnesses who can give sworn evidence and those who can give unsworn evidence. Third, the law could be amended by taking the approach which is in place in Scotland: the testing of competence could be abolished, allowing the court to hear the evidence and assess the weight or importance to be attached to it. The consultation paper asked consultees whether they considered that the law relating to a person's competence to give evidence in civil proceedings should be reformed. The paper also asked whether consultees agreed with the Scottish approach of abolishing the test of competence in its entirety.
- 4.22 The response to the questions was limited in nature. However, of the consultees who did respond, all but one considered that there was a need to reform the current law. The consultees who did agree with the reform of the law on competence to give evidence in civil proceedings considered that the rationale for such a reform lay in improving access to justice and the fair

treatment of witnesses. One consultee suggested that the issue of competence be addressed in the light of the work on mental capacity which is being undertaken by the Department of Health, Social Services and Public Safety in Northern Ireland at present. However, the Commission does not see a direct relationship between the two issues as the policy work on mental capacity relates to a person's autonomy to make decisions for himself, rather than his ability to give evidence to a court. The consultee who suggested that the law should remain as it stands at present gave no explanation for this viewpoint, so it is difficult for the Commission to understand the arguments behind this assertion.

- 4.23 In relation to the question in the consultation paper which asked consultees to consider the merits or otherwise of the Scottish approach of abolishing a test for competence for witnesses, the majority of consultees agreed that the Scottish approach has benefits. The consultee who disagreed with the Scottish approach being adopted stated that it was considered that a witness who is not competent to give evidence would “add confusion” to the proceedings and asked what a witness who is “not of sound mind/delusional” could add to the process. This consultee went on to conclude that it is a waste of court time to hear evidence from a witness who is not competent if that evidence is eventually to be given little weight or it is to be disregarded by the court.
- 4.24 The Commission does not agree with this reasoning. Attempts to facilitate access to justice for any person cannot be described as a waste of time. It is a fundamental right in a democratic, free society and it is a right enshrined by the European Convention on Human Rights. The Commission considers that the current law on competence to give evidence in civil proceedings is outdated and is in need of an overhaul. For example, the law created by cases such as *R v Hill*²³⁶ was determined during a period when mental ill health was viewed in a wholly different way than it is today.²³⁷ The law relating to the competence to

²³⁶ See paragraph 5.2 above.

²³⁷ Around this time, people suffering from “lunacy” were likely to find themselves in private or public lunatic asylums. In England and Wales, the Lunacy Act of 1845 marked the first attempt to form a comprehensive system of licensed and supervised asylums, therefore enabling the mentally ill to be detained in a system which did not rely on private “madhouses”, public workhouses or prisons. However, restraint in the form of chains, handcuffs, collars and strait-waistcoats were commonplace and drug treatment was almost non-existent, with the sedative laudanum (opium) being one of the only drugs available. Sedatives could only be given orally, therefore, it was difficult to administer them to uncooperative patients. Only after the invention of the hypodermic needle in 1853 (invented simultaneously but independently by the Scottish doctor Alexander Wood and Charles Pravaz of France) could patients receive drugs without their consent. Baths of various temperatures and jets of water were the preferred treatment

give evidence of people who are deaf and unable to communicate by speech would be considered as inappropriate by many people in today's society.²³⁸ The Commission therefore considers that there is a strong argument for reforming the law on competence to give evidence in civil proceedings.

4.25 In relation to the form that the reform should take, the Commission has considered two questions: first, if there should be a test for competence and if so, second, how it should be formulated. In relation to the first issue, although a number of consultees favoured the Scottish approach, which enables all witnesses to give evidence without first being tested for their competence to do so, the Commission considers that there is a possibility that this evidence-giving process may be detrimental to some witnesses. The Commission appreciates that there is a strong argument to allow all witnesses to access justice. However, there has to be a realisation that the justice system also owes witnesses a certain level of protection. Giving evidence in court can be a distressing experience for any witness, but the distress caused by the proceedings will be much greater for someone who cannot understand the proceedings or his role in them. Of course, every effort must be made by the court to facilitate the understanding of the witness: special measures such as the use of intermediaries are key in achieving this aim, but the justice system must strike a balance between encouraging participation in court proceedings and protecting the most vulnerable members of society. The Commission considers that a test for competence is a method of offering such protection and therefore rejects the Scottish approach, which it considers may put an unfair burden on certain witnesses.

4.26 The second issue, that of how the test should be constructed, must also be given consideration. The Commission is attracted to the model which is contained in the criminal law in Northern Ireland which provides that all persons are competent to give evidence, but they must be able to understand questions which are asked of them and give answers which can be understood. The criminal model is quite wide in scope. For example, it does not require the witness to understand the consequences of his evidence, nor does it require

methods. See chapter 1 of Thomas Bewley, *Madness to Mental Illness: A History of the Royal College of Psychiatrists* (London: RCPsych Publications, 2008) ch1.

²³⁸ Contrast this position with the criminal case reported in *The Times* (Friday 6 November 2009) in which a conviction for sexual abuse was secured in a case where one witness communicated her evidence by blinking her eyes in response to yes or no questions put to her by lawyers whilst another witness used a pointer on a computer screen to identify the accused and to indicate what he had done to her by using symbols of body parts.

him to provide answers of any particular quality. The Commission considers that this approach is inclusive, but appropriately focuses on a fundamental consideration: the witness's understanding of the questioning. Without understanding, there is a risk that confusion and distress will occur which is something which the Commission is anxious to avoid being caused to witnesses. Of course, this understanding should be supported and facilitated by appropriate methods, including the use of special measures, so that every witness who is capable of understanding and being understood is afforded that opportunity.

Sworn or unsworn evidence

- 4.27 If the question of competence to give evidence in civil proceedings presents itself for consideration, the issue of whether that evidence should be given under oath or unsworn also falls to be contemplated.
- 4.28 The current law appears to the Commission to be unsatisfactory. Unless a witness is a child, he is required to give evidence under oath and he must have an appreciation of the solemnity of the occasion and the importance of telling the truth. This effectively rules out a witness who may be able to understand questions and give understandable answers, yet who may not be able to appreciate moral concepts such as solemnity and truth. In relation to children, the wording of Article 169(4) of the Children (Northern Ireland) Order 1995 also creates an unfairness. The test demands that children have to give evidence under oath, unless they do not understand the nature of an oath. If the latter is the case, the child's evidence may be heard if the court considers that he understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence being heard. This rules out a child who can understand and answer questions, yet who cannot fully comprehend that he has a duty to be truthful.
- 4.29 The Commission considers that the criminal model which is in place in Northern Ireland is a more suitable model to adopt in relation to sworn and unsworn evidence in civil proceedings. It requires a witness to be competent in order to give sworn or unsworn evidence, but in order to give sworn testimony, the witness must be over 14 years of age and have a sufficient appreciation of the solemnity of the occasion and the particular responsibility to tell the truth.²³⁹ If a

²³⁹ Article 33(2) of the Criminal Evidence (Northern Ireland) Order 1999.

witness demonstrates that he understands questions and can give understandable answers, then there will be a presumption that he has sufficient understanding of the solemnity of the occasion and the responsibility to tell the truth, unless evidence to the contrary is adduced.²⁴⁰ Unsworn evidence can be given by a competent witness who is under 14 or who does not have an appreciation of the solemnity of the occasion and the responsibility to tell the truth.²⁴¹ Rather than ruling out testimony at the outset, this approach is permissive and allows the court the freedom to attach the appropriate weight to the evidence that is given; yet keeps in place the central tenet of ensuring that a witness understands, and can answer, questions that are put to him. **The Commission recommends the adoption in civil proceedings of the test governing the competence of witnesses to give evidence in criminal proceedings, coupled with the criminal model which determines whether a witness is to give sworn or unsworn evidence.**

- 4.30 The Commission also considers it appropriate to create an offence in relation to wilfully giving false unsworn evidence. This would act as a deterrent to any witness who is considering wilfully giving false evidence and would also provide a suitable sanction. However, it must be acknowledged that the potential offenders are likely to be particularly vulnerable individuals. Accordingly, any such offence should carry an appropriately weighted and proportionate penalty. Therefore, the Commission considers that a witness who wilfully gives false unsworn evidence in such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, then that witness should be liable to summary prosecution for an offence punishable by a fine not exceeding level 1 on the standard scale.²⁴² The Commission notes that the creation of a criminal offence can also open up avenues of assistance for individuals which lie outside the criminal justice system.

²⁴⁰ Article 33(3) of the Criminal Evidence (Northern Ireland) Order 1999.

²⁴¹ Article 34 (1) and (2) of the Criminal Evidence (Northern Ireland) Order 1999.

²⁴² That is to say, £200. See Article 3(2) of the Criminal Justice (Northern Ireland) Order 1994 which substituted a new Article 5(2) into the Fines and Penalties (Northern Ireland) Order 1984.

CHAPTER 5. SUMMARY OF RECOMMENDATIONS

CHAPTER ONE

The Commission recommends that a scheme of special measures be put in place on a statutory basis in relation to civil proceedings in Northern Ireland.

CHAPTER TWO

1. The Commission recommends that all parties and witnesses involved in civil proceedings should be able to avail of special measures if they are eligible to do so.
2. The Commission recommends that child witnesses should be eligible for special measures in civil proceedings.
3. The Commission recommends that any special measures should be available to children under the age of eighteen.
4. The Commission recommends that child witnesses are automatically entitled to certain special measures, unless those special measures will not maximise the quality of the child's evidence.
5. The Commission recommends that children should be automatically entitled to give their evidence by way of live television link, unless the use of that special measure will not be likely to maximise the quality of their evidence. This automatic protection should be capable of being enhanced by the use of other appropriate special measures, where necessary.
6. The Commission recommends that child witnesses should be afforded the opportunity to opt out of using live television link or screens, provided that the court agrees that opting does not diminish the quality of the evidence, taking into account the following factors:
 - the age and maturity of the child;
 - the ability of the child to understand the consequences of giving evidence without special measures;
 - the best interests of the child;
 - the views of the parent or those with parental responsibility for the child;
 - the relationship between the child and any party to the proceedings;
 - the nature of the proceedings; and
 - any other considerations which the court considers to be relevant.
7. The Commission recommends that people who are living with mental illness, learning disability or personality disorder should be eligible for special measures

if the quality of their evidence is likely to be diminished because of that illness, disability or disorder.

8. In order to maximise protection for witnesses and to offer the court maximum flexibility to assist witnesses who are experiencing a physical disability or disorder, the Commission recommends that physical disability or disorder should be an eligibility criterion for special measures in civil proceedings if the disability or disorder is likely to result in the diminishment of the quality of the witness's evidence.
9. The Commission recommends that a witness in civil proceedings whose evidence may be diminished in quality because they are suffering fear or distress in connection with testifying should be eligible for special measures.
10. The Commission recommends that the factors that the court must take into account when satisfying itself that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings should be as follows:
 - the nature and circumstances of the alleged matter to which the proceedings relate;
 - the nature of the evidence which the witness is likely to give;
 - the age of the witness;
 - the relationship (if any) between the witness and any party to the proceedings;
 - such of the following matters as appear to the court to be relevant, namely:
 - (i) the racial group of the witness (as defined by the Race Relations (Northern Ireland) Order 1997;
 - (ii) the domestic and employment circumstances of the witness;
 - (iii) any religious beliefs or political opinions of the witness; and
 - (iv) the witness's sexual orientation;
 - any behaviour towards the witness on the part of:
 - (i) any party to the proceedings;
 - (ii) members of the family or associates of any such party; or
 - (iii) any other person who is likely to be a party to the proceedings or a witness in the proceedings; and
 - such other matters as the court considers relevant.

CHAPTER THREE

1. The Commission recommends that screens should be available to witnesses who are eligible for special measures in civil proceedings.

2. The Commission recommends that the removal of wigs and gowns should be included as a special measure in civil proceedings.
3. The Commission recommends that a special measure which allows for the video-recording of a witness's evidence-in-chief should only be made available on a limited basis, namely in relation to private law and public law proceedings taken under the Children (Northern Ireland) Order 1995.
4. The Commission recommends that live television link should be available as a special measure as it offers witnesses valuable protection when they are giving evidence, which, in turn, will increase witnesses' confidence in the civil justice system.
5. The Commission recommends that the use of intermediaries is included as a special measure in civil proceedings in Northern Ireland.
6. The Commission recommends that aids to communication should be included as a special measure for witnesses in civil proceedings who may need them.
7. The Commission recommends that witnesses who are to give their evidence by way of live television link in civil proceedings should be able to avail of the services of a suitably trained supporter in the live television link room. The Commission also recommends that government should give consideration to creating a scheme which allows all vulnerable and intimidated witnesses in civil proceedings to utilise the services of supporters.

CHAPTER FOUR

The Commission recommends the adoption in civil proceedings of the test governing the competence of witnesses to give evidence in criminal proceedings, coupled with the criminal model which determines whether a witness is to give sworn or unsworn evidence.

CHAPTER 6. EQUALITY SCREENING

Part 1. Policy scoping

Information about the policy

Name of the policy

The title of this policy is “Protections for witnesses giving evidence in civil proceedings.”

Is this an existing, revised or new policy?

This is a new policy.

What is it trying to achieve? (intended aims/outcomes)

The policy aims to offer protection to certain witnesses who may experience difficulties when giving evidence to a court in civil proceedings.

Usually, witnesses appear in person in court and give their evidence orally. They are subject to examination-in-chief, cross-examination and re-examination. However, in criminal proceedings, the Criminal Evidence (Northern Ireland) Order 1999 allows certain witnesses to avail of protections (“special measures”) when giving evidence in court in particular circumstances. Children under the age of seventeen (and over seventeen in some circumstances) may give evidence by way of special measures. Witnesses who are experiencing a mental illness, learning disability or physical disability or disorder may also use special measures. Witnesses are also eligible to use special measures on the basis that they are suffering fear and distress in connection with giving evidence and as a result, the quality of their evidence may be diminished.

Various special measures are available to eligible witnesses in criminal proceedings. Children and witnesses who are experiencing mental illness, learning disability or physical disability or disorder can apply to use screens; can give evidence by live television link; can give evidence in private; can have wigs and gowns removed by judges and legal representatives in the courtroom; can have their evidence pre-recorded; can have their cross-examination pre-recorded (not yet in force); can be examined through an intermediary (not yet in force); and can avail of aids to communication. Witnesses suffering from fear and distress in connection with testifying

can avail of all the above mentioned special measures, save from the use of intermediaries and aids to communication.

Special measures have proved beneficial to witnesses in criminal proceedings and the Commission considers that similar protections should be made available to witnesses in civil proceedings.

The policy also seeks to modernise the law relating to the competence of a witness to give evidence in civil proceedings. The Commission considers that this area requires change to ensure that all witnesses are afforded a fair opportunity to participate in court proceedings.

Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

This policy has a positive impact on all members of the public who may be called upon to give evidence in civil proceedings, but particularly children and people who are living with a mental illness, learning disability or physical disability. Although these witnesses already have access to justice in civil courts, they will be assisted in giving their evidence by the use of special measures. Special measures will assist these witnesses to participate fully in the court proceedings, engage with the court process and will facilitate them in giving their best evidence to the court.

Changes to the law relating to the competence of a witness to give evidence in civil proceedings will promote opportunities for participation in court proceedings for children and those living with a mental illness, learning disability or physical disability.

Who initiated or wrote the policy?

The Commission is responsible for devising the policy.

Who owns and who implements the policy?

The Commission will make its recommendations to government, who will decide whether to adopt the recommendations and duly implement them.

Implementation factors

Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision?

There are no financial or legislative factors that can detract from the intended aim or outcome of the policy apart from the availability of finances to implement the policy.

Main stakeholders affected

Who are the internal and external stakeholders (actual or potential) that the policy will impact on?

The policy will impact positively upon service users, that is to say, court users. Other stakeholders who are potentially affected by this policy, if it is implemented by government, are the department with responsibility for the implementation of the policy and the Northern Ireland Courts and Tribunals Service, which has responsibility for the operation of the courts in Northern Ireland.

Other policies with a bearing on this policy

There are no other policies which have a bearing on this policy.

Available evidence

What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

Section category	75	Details of evidence/information
Religious belief		Northern Ireland Courts and Tribunals Service produce statistics that are of interest in carrying out a screening analysis. Customer Exit Surveys are biennial surveys which are carried out on a number of court users over a period of time and are designed to give a snap shot of court users and their experiences. Four surveys are available for consideration. The Customer Exit Survey 2005, which was carried out across all courts in Northern Ireland from 5th September 2005 to 10th February 2006, sought information from 1772 respondents over three areas of experience – civil, family and criminal courts. Upon analysis, these statistics reveal that 45.5% of users of civil courts during this period were Catholic, 43.1% were Protestant and 26% did not specify their religion. Analysis of the statistics

	<p>revealed that 50.7% of users of family courts were Catholic, 39.6% were Protestant and 9.7% did not specify their religion.</p> <p>The Customer Exit Survey 2007/2008, which was carried out at the end of 2007 across all court locations, resulted in 1883 responses. This survey reveals that 41.5% of users of civil courts were Catholic, 44.8% were Protestant, 0.8% specified another religion, 8.8% were no religion and 4.3% did not specify their religion. Of the respondents who indicated another religion, the religions specified included Orthodox, Church of England, Church of Scotland and mixed religion.</p> <p>The Customer Exit Survey 2007/2008 revealed that 46.3% of family court users were Catholic, 41.2% were Protestant and other Christian religions, 0.3% were Buddhist, 0.3% were Muslim, 0.8% specified another religion, 6% were no religion and 5.1% did not specify a religion. Of the respondents who indicated another religion, the religions specified included Jehovah's Witness, Irish Traveller and spiritual.</p> <p>The Customer Exit Survey 2009 indicates that of civil court users 49.1% were Catholic, 15.4% were Presbyterian, 13.4% were Church of Ireland, 2.6% were Methodist, 0.6% were Baptist, 0.6% were Free Presbyterian, 0.3% were Brethren, 7.6% were Protestant but did not specify their denomination, 2.3% did not specify which denomination of Christianity they subscribed to, 0.3% were Muslim, 1.5% belonged to the category "any other religion" and 6.4% stated that they did not subscribe to any religion.</p>
Political opinion	Statistics indicating the political opinion of civil court users in Northern Ireland do not appear to be available.
Racial group	<p>The Northern Ireland Court Service Customer Exit Survey 2007/2008 indicates that 98.3% of civil court users are White, 0.5% Chinese, 0.3% Bangladeshi, 0.3% other Asian, 0.3% mixed ethnic group and 0.5% did not specify their racial group. Of family court users, 98.4% were White, 0.3% Chinese, 0.3% Irish Traveller, 0.3% indicated that they belonged to another racial group and 0.8% did not specify which ethnic group they belonged to.</p> <p>The Customer Exit Survey 2009 reveals that 98.9% of civil court users were White, 0.6% were Chinese, 0.3% Irish Traveller whilst 0.3% belonged to a "mixed ethnic group".</p>
Age	<p>The Northern Ireland Customer Exit Survey 2005 indicates that 14.5% of the civil court users surveyed were in the 16-24 age group, 26.7% were in the 25-34 age group, 24.2% were in the 35-44 age group, 28.1% were in the 45-59 age group, 5.4% were aged 60 or over and 1.1% of users did not specify their age. Of respondents attending court on family business, 9.2% were in the 16-24 age group, 30% were in the 25-34 age group, 33.2% were in the 35-44 age group, 21.2% were in the 45-59 age group, 3.8% were aged 60 and over and 2.6% did not specify their age.</p> <p>The 2007/2008 Survey reveals the following statistics:</p>

	Age of respondent	Civil court users	Family court users															
	Below the age of 17	0.3%	1.1%															
	17-25	9.8%	14.4%															
	26-35	24.8%	31.2%															
	36-45	24.8%	29.5%															
	46-55	22.8%	14.1%															
	56-65	10.3%	4.6%															
	More than 65 years	4%	1.4%															
	Did not specify age	3.5%	3.8%															
	The 2009 Survey showed the following:																	
<table><tr><td>Age of respondent</td><td>Civil court users</td></tr><tr><td>Below the age of 17</td><td>0.3%</td></tr><tr><td>17-25</td><td>15.3%</td></tr><tr><td>26-35</td><td>29.7%</td></tr><tr><td>36-45</td><td>26.2%</td></tr><tr><td>46-55</td><td>17.6%</td></tr><tr><td>56-65</td><td>9.2%</td></tr><tr><td>More than 65 years</td><td>1.7%</td></tr></table>			Age of respondent	Civil court users	Below the age of 17	0.3%	17-25	15.3%	26-35	29.7%	36-45	26.2%	46-55	17.6%	56-65	9.2%	More than 65 years	1.7%
Age of respondent	Civil court users																	
Below the age of 17	0.3%																	
17-25	15.3%																	
26-35	29.7%																	
36-45	26.2%																	
46-55	17.6%																	
56-65	9.2%																	
More than 65 years	1.7%																	
Other information considered by the Commission indicates that children who are required to give evidence in court proceedings (albeit criminal proceedings with particular focus on proceedings relating to sexual offences) experience anxiety and behavioural disturbances, as well as difficulties in understanding the proceedings that they are involved in. See for example, Goodman, Taub, Jones, England, Port, Ruby and Prado, <i>Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims</i> (1992) and Plotnikoff and Woolfson, <i>Measuring Up? Evaluating the implementation of government commitments to young witnesses in criminal proceedings</i> (July 2009).																		
Marital status	<p>The Northern Ireland Court Service Customer Exit Survey 2007/2008 reveals that of court users who attended court on civil business during the period of the survey, 33.5% were single, 50.8% were married and living with a spouse, 0.8% were in a civil partnership, 4.8% were married but separated from their spouse, 6.5% were divorced, 1.5% were widowed and 2.3% did not specify their marital or civil partnership status. Of court users who attended court on family business, 40.4% were single, 30.9% were married and living with a spouse, 0.3% were in a civil partnership, 17.3% were married but separated from their spouse, 7.9% were divorced, 1.4% were widowed and 1.9% did not specify their marital or civil partnership status.</p> <p>The Customer Exit Survey 2009 shows that of civil court users during the period of the survey, 41.5 % were single, 47.9% were married and living with a spouse, 0.9% were in a civil partnership, 4% were married and separated from a spouse, 5.2% were divorced and 0.6% were widowed.</p>																	
Sexual orientation	Statistics indicating the sexual orientation of civil court users in Northern Ireland do not appear to be available.																	
Men and women	The Northern Ireland Customer Exit Survey 2005 reveals that 60.5% of civil court users surveyed were male, whilst 38.9% were female and 0.9% did not specify their gender.																	

generally	<p>not indicate their gender. Males using family courts made up 35.5% of users, whilst 63.7% were female and 1% of respondents did not specify their gender. The Customer Exit Survey 2007/2008 reveals that 58.8% of civil court users were male, 40.8% were female, whilst 0.5% did not specify their gender. Of respondents attending court for family business, 42.3% were male, 56.9% were female and 0.8% did not specify their gender. The Customer Exit Survey 2009 shows that, in that year, 61.6% of civil court users were male and 38.4% were female.</p> <p>Applications for relief from domestic violence under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 are perhaps one area in which a party to the proceedings may wish to avail of protective measures. Judicial Statistics, which are published every year by the Northern Ireland Courts and Tribunals Service, provide information in relation to how many applications under the 1998 Order are made and disposed of each year, though the statistics do not break the numbers down by gender or any of the other section 75 categories. In the Family Division of the High Court, 21 applications under the 1998 Order were disposed of between January and June 2010, 63 were disposed of in 2009, 51 in 2008, 37 in 2007 and 51 in 2006.</p> <p>In Magistrates' courts between January and June 2010, 2368 applications were disposed of under the 1998 Order, 5246 were disposed of in 2009 and 4734 in 2008. No statistics were available for 2007, and in 2006, 3334 applications for non-molestation orders were disposed of and 1068 combination non-molestation and occupation orders were disposed of. Setting these statistics alongside crime statistics produced yearly by the Police Service of Northern Ireland (PSNI Annual Statistical Reports), it is possible to tentatively identify trends in relation to the gender of applicants who apply for protections under the Family Homes and Domestic Violence (Northern Ireland) Order 1998. PSNI Annual Statistical Reports reveal the following information for recorded crimes with a domestic motivation:</p> <table><tr><th>Year</th><th>Females 17 and over</th><th>Males 17 and over</th><th>Children under 17</th><th>Gender/age unknown</th><th>Total Offences</th></tr><tr><td>2009/2010</td><td>59.87%</td><td>19.73%</td><td>8.13%</td><td>12.27%</td><td>9903</td></tr><tr><td>2008/2009</td><td>59.0%</td><td>19.9%</td><td>8.4%</td><td>12.7%</td><td>9211</td></tr><tr><td>2007/2008</td><td>60.6%</td><td>19.1%</td><td>6.1%</td><td>14.3%</td><td>9283</td></tr><tr><td>2006/2007</td><td>61.5%</td><td>20.3%</td><td>5.7%</td><td>12.5%</td><td>10115</td></tr><tr><td>2005/2006</td><td>60.0%</td><td>19.7%</td><td>5.0%</td><td>15.3%</td><td>10768</td></tr></table> <p>Since recorded crimes with a domestic motivation in Northern Ireland affect women more often than men, it seems possible to assume that the trend continues into court proceedings for civil remedies for domestic violence.</p>	Year	Females 17 and over	Males 17 and over	Children under 17	Gender/age unknown	Total Offences	2009/2010	59.87%	19.73%	8.13%	12.27%	9903	2008/2009	59.0%	19.9%	8.4%	12.7%	9211	2007/2008	60.6%	19.1%	6.1%	14.3%	9283	2006/2007	61.5%	20.3%	5.7%	12.5%	10115	2005/2006	60.0%	19.7%	5.0%	15.3%	10768
Year	Females 17 and over	Males 17 and over	Children under 17	Gender/age unknown	Total Offences																																
2009/2010	59.87%	19.73%	8.13%	12.27%	9903																																
2008/2009	59.0%	19.9%	8.4%	12.7%	9211																																
2007/2008	60.6%	19.1%	6.1%	14.3%	9283																																
2006/2007	61.5%	20.3%	5.7%	12.5%	10115																																
2005/2006	60.0%	19.7%	5.0%	15.3%	10768																																
Disability	<p>The Northern Ireland Court Service Customer Exit Survey 2007/2008 contains statistics in relation to the numbers of court users who consider that they have a disability, as defined by the Disability Discrimination Act 1995.²⁴³ The statistics show that 7.5% of civil court users considered that they met the 1995 Act definition, 91.8% said that they did not meet the definition, whilst 0.8% did not respond to the question. Of family court</p>																																				

²⁴³ A person has a disability for the purposes of the 1995 Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

	<p>users, 8.1% indicated that they met the 1995 Act definition of disability, 93.2% said that they did not and 1.9% did not respond to the question. The statistics in the Customer Exit Survey 2009 show that 7.5% of civil court users considered that they met the met 1995 Act definition whereas 92.5% considered that they did not.</p> <p>Other information examined by the Commission includes McLeod, Philpin, Sweeting, Joyce and Evans, <i>Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity</i> (Ministry of Justice Research Series 10/10 July 2010) which indicates that court users, both in criminal and civil proceedings, living with mental health conditions and learning disabilities experience particular difficulties when giving evidence in court. Many court users find difficulty with legal language and terminology and experience problems in understanding the questions that are asked during the proceedings. The research concludes that this results in confusion for the court users which negatively affects their demeanour in court.</p>
Dependants	<p>The Northern Ireland Court Service Customer Exit Survey 2007/2008 indicates that of users attending court on civil business during the period of the survey, 45% had dependant children, 52.8% did not have dependant children and 2.3% did not specify whether they did or did not have dependant children. Respondents were also asked whether they had adults who were dependant on them. Six and a half percent had dependant adults, whilst 92.3% did not and 1.3% did not specify whether they did or not. Of court users attending court on family business, 60.7% had dependant children, 37.1% did not have dependant children and 2.2% did not specify whether they did or did not have dependant children. When asked whether they had adult dependants, 4.9% responded that they did, 93.2% responded that they did not and 1.9% did not indicate whether they did or did not. The Customer Exit Survey 2009 reveals that 44.7% of civil court users had children dependent on them, while 55.3% did not. Of civil court users 4.9% had and 95.1% did not have adults living with them who are sick, disabled or elderly whom they looked after or gave special help to.</p>

Needs, experiences and priorities

Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories.

Section category	75 Details of needs/experiences/priorities
Religious belief	<p>People of different religious beliefs already have full access to justice in Northern Ireland. However, following the model put in place by the Criminal Evidence (Northern Ireland) Order 1999, the Commission's policy recognises that a witness's religious belief may be a factor that the court may wish to take into account when determining whether special measures should be granted on the basis that the quality of the witness's evidence</p>

	<p>may be diminished because of fear and distress experienced in connection with giving evidence. If religious belief is a factor in causing a witness fear and distress about testifying, special measures may be granted to assist the witness to give his best evidence to the court and therefore allow him to fully participate in the proceedings.</p>
Political opinion	<p>People with any political opinion can access justice in Northern Ireland. However, following the model put in place by the Criminal Evidence (Northern Ireland) Order 1999, the Commission's policy recognises that a witness's political opinion may be a factor that the court may wish to take into account when determining whether special measures should be granted on the basis that the quality of the witness's evidence may be diminished because of fear and distress experienced in connection with giving evidence. If political opinion is a factor in causing a witness fear and distress about testifying, special measures may be granted to assist the witness to give his best evidence to the court and therefore allow him to fully participate in the proceedings.</p>
Racial group	<p>People from all racial groups can access justice in Northern Ireland. However, following the model put in place by the Criminal Evidence (Northern Ireland) Order 1999, the Commission's policy recognises that the racial group with which a witness identifies may be a factor that the court may wish to take into account when determining whether special measures should be granted on the basis that the quality of the witness's evidence may be diminished because of fear and distress experienced in connection with giving evidence. If identifying with a particular racial group is a factor in causing a witness fear and distress about testifying, special measures may be granted to assist the witness to give his best evidence to the court and therefore allow him to fully participate in the proceedings.</p>
Age	<p>Children experience particular difficulties when giving evidence in court. This policy takes account of the special protection which children need, together with an acknowledgement that children should also be given a choice about using special protections, albeit with appropriate safeguards. Therefore, the policy allows children automatic entitlement to give evidence by way of certain special measures. If the court considers that it is appropriate to do so, children can opt out of using special measures and give oral evidence to the court.</p> <p>More generally, following the model put in place by the Criminal Evidence (Northern Ireland) Order 1999, the Commission's policy recognises that a witness's age may be a factor that the court may wish to take into account when determining whether special measures should be granted on the basis that the quality of the witness's evidence may be diminished because of fear and distress experienced in connection with giving evidence. If age is a factor in causing a witness fear and distress about testifying, special measures may be granted to assist the witness to give his best evidence to the court and therefore allow him to fully participate in the proceedings.</p> <p>Modernising the law on the competence of a witness to give evidence in civil proceedings will facilitate the participation of children in the court process.</p>

Marital status	There is no evidence that people of differing marital status (or civil partnership status) have any particular needs, experiences and priorities in relation to this policy.
Sexual orientation	People of all sexual orientations can access justice in Northern Ireland. However, following the model put in place by the Criminal Evidence (Northern Ireland) Order 1999, the Commission's policy recognises that sexual orientation may be a factor that the court may wish to take into account when determining whether special measures should be granted on the basis that the quality of the witness's evidence may be diminished because of fear and distress experienced in connection with giving evidence. If sexual orientation is a factor in causing a witness fear and distress about testifying, special measures may be granted to assist the witness to give his best evidence to the court and therefore allow him to fully participate in the proceedings.
Men and women generally	Men and women have equal access to justice in Northern Ireland. However, this policy is likely to assist witnesses in cases under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 who have experienced domestic violence. Statistics show that more women than men are affected by domestic violence each year in Northern Ireland, however this gender imbalance is a product of the nature of domestic violence, rather than the out-workings of the Commission's policy. The policy is therefore gender neutral in effect, allowing both men and women to apply for protections whilst giving evidence if they need them.
Disability	<p>People living with disability may experience difficulties when giving evidence in court. However, it is important to note that not all people experiencing a disability will have such a problem. The policy takes account of the needs of witnesses living with a disability by allowing them to apply for special measures to assist them to give their evidence to the court. This is a choice for witnesses and they are given a variety of options. As well as special measures which offer protection from giving oral evidence openly in a formal environment, the policy offers witnesses the option of applying for special measures which assist with any communication difficulties which the witness may experience, that is to say, the use of intermediaries and aids to communication.</p> <p>Modernising the law on the competence of witnesses to give evidence in civil proceedings will facilitate participation in the court process of those who are living with disability.</p>
Dependants	There is no evidence that people with or without dependants have any particular needs, experiences and priorities in relation to this policy.

Part 2. Screening questions

1. What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 categories?

Section category	75 Details of policy impact	Level of impact? minor/major/none
Religious belief	<p>The Commission considers that the categories of people who could be affected by the proposals to introduce special measures for witnesses in civil proceedings (children; people with a mental disorder or other significant impairment of intelligence or social functioning; those with a physical disability or disorder and those suffering from fear and distress) are likely to come from all religious backgrounds.</p> <p>The policy specifies that the religious belief of the witness is included as one of a range of factors that the court must take into account when considering whether a witness should be eligible to avail of special measures on the basis that the quality of his evidence may be diminished on the basis of fear and distress experienced in connection with testifying.</p> <p>The Commission does not consider that this provision confers any differential impact on this Section 75 group as people with different religious beliefs would be on an equal footing before the court when it is considering whether special measures should be granted. The court must consider whether the quality of a witness's evidence will be diminished due to fear or distress about testifying: religious belief is merely a reason why a witness may be experiencing fear and distress about giving evidence and will only be taken into account if the court thinks that it is relevant.</p>	None.
Political opinion	<p>The Commission considers that the categories of people who could be affected by the proposals to introduce special measures for witnesses in civil proceedings (children; people with a mental disorder or other significant impairment of intelligence or social functioning; those with a physical disability or disorder and those suffering from fear and distress) are likely to hold a wide variety of political opinions.</p> <p>The Commission recommends that the political opinions of the witness would be specified as one of a range of factors that the court must take into account when considering whether a witness should be eligible to avail of special measures on the basis that the quality of his evidence will be diminished because he is suffering fear and</p>	None.

	<p>distress about testifying.</p> <p>The Commission does not consider that its recommended policy has a differential impact on this Section 75 group as people of different political opinions would be on an equal footing before the court when it is considering whether special measures should be granted. The court must consider whether the quality of a witness's evidence will be diminished due to fear or distress about testifying: political opinion is merely a reason why a witness may be experiencing fear and distress about giving evidence and will only be taken into account if the court thinks that it is relevant.</p>	
Racial group	<p>The Commission considers that the categories of people who could be affected by the proposals to introduce special measures for witnesses in civil proceedings (children; people with a mental disorder or other significant impairment of intelligence or social functioning; those with a physical disability or disorder and those suffering from fear and distress) are likely to come from a wide variety of racial groups.</p> <p>The Commission proposes that the racial group which the witness identifies with would be specified as one of a range of factors that the court must take into account when considering whether a witness should be eligible to avail of special measures on the basis that the quality of his evidence will be diminished because he is suffering fear and distress in connection with testifying.</p> <p>The Commission does not consider that its recommended policy has a differential impact on this Section 75 group as people who identify with different racial groups would be on an equal footing before the court when it is considering whether special measures should be granted. The court must consider whether the quality of a witness's evidence will be diminished due to fear or distress about testifying: racial grouping is merely a reason why a witness may be experiencing fear and distress about giving evidence and will only be taken into account if the court thinks that it is relevant.</p>	None.
Age	<p>Although, in theory, children and adults can equally access the civil justice system in Northern Ireland, the Commission considers that its policy recommendations respond to the additional needs of children who are providing</p>	Minor.

	<p>evidence in court proceedings. As such, these recommendations have a differential impact on children as opposed to adults.</p> <p>The Commission has made the following relevant recommendations with respect to children:</p> <ul style="list-style-type: none"> • all children should be eligible for special measures in civil proceedings; • any special measures should be available to children under the age of eighteen; • child witnesses should be automatically entitled to certain special measures, unless those special measures will not maximise the quality of the child's evidence; • child witnesses should be afforded the opportunity to opt out of using live television links or screens, provided the court agrees to take account a specified list of factors. <p>The Commission considers that any differential impact in respect of these recommendations is justifiable. The policy will allow children to participate in court proceedings, whilst ensuring that they are protected from a process which can be, at best, disconcerting and at worst, intimidating. Furthermore, by affording children the opportunity to opt out of provisions the Commission recognises that some children will wish to participate in the process without such protections. However, their decision is subject to the court's scrutiny to ensure that the child's needs are fully taken into account. Therefore, the Commission considers that this policy has a positive impact on children.</p> <p>In addition to recommending that children should be eligible for special measures, the Commission recommends that the age of the witness would be specified as one of a range of factors that the court must take into account when considering whether a witness should be eligible to avail of special measures on the basis that the quality of their evidence will be diminished because they are experiencing fear and distress about testifying.</p> <p>The Commission does not consider that its policy has a differential impact on this Section 75 group as people of different ages would be on an equal</p>	
--	--	--

	<p>footing before the court when it is considering whether special measures should be granted. The court must consider whether the quality of a witness's evidence will be diminished due to fear or distress about testifying; age is merely a reason why a witness may be experiencing fear and distress about giving evidence and will only be taken into account if the court thinks that it is relevant.</p> <p>The Commission's recommendations to modernise the law on the competence of witnesses to give evidence in civil proceedings creates a positive impact on children. By putting emphasis on a child's ability to understand questions and be understood when giving answers (with the necessary assistance by trained professionals such as intermediaries) allows greater access to court proceedings and increases the opportunity to participate.</p>	
Marital status	<p>The Commission does not consider that its proposed policy has a differential impact on people of different marital (or civil partnership) status on the basis that applicants for special measures in civil proceedings will be able to avail of those protections regardless of whether they are married or in a civil partnership.</p>	None.
Sexual orientation	<p>The Commission considers that the categories of people who could be affected by the proposals to introduce special measures for witnesses in civil proceedings (children; people with a mental disorder or other significant impairment of intelligence or social functioning; those with a physical disability or disorder and those suffering from fear and distress) are likely to be of different sexual orientations.</p> <p>The Commission proposes that sexual orientation would be specified as one of a range of factors that the court must take into account when considering whether a witness should be eligible to avail of special measures on the basis that the quality of his evidence will be diminished because he is suffering fear and distress in connection with testifying.</p> <p>The Commission does not consider that its recommended policy has a differential impact on this Section 75 group as people with different sexual orientations would be on an equal footing before the court when it is considering whether special measures should be granted. The court</p>	None.

	<p>must consider whether the quality of a witness's evidence will be diminished due to fear or distress about testifying: sexual orientation is merely a reason why a witness may be experiencing fear and distress about giving evidence and will only be taken into account if the court thinks that it is relevant.</p>	
Men and women generally	<p>The Commission does not consider that its proposed policy has a differential impact on people of different genders on the basis that applicants for special measures in civil proceedings will be able to avail of those protections regardless of their gender.</p>	None.
Disability	<p>The Commission does not assume that every person living with a mental disability or disorder, learning disability, personality disorder or physical disability or disorder will need or wish to avail of special measures in order to provide their best evidence in civil proceedings. As such, it is not recommended that people living with these illnesses, disabilities and disorders are automatically eligible for special measures. However the Commission's priority is to address the needs of those witnesses who, as a result of their condition, do require assistance when providing evidence. It is therefore recommended that people who are living with a mental illness, learning disability, personality disorder or physical disability or disorder should be eligible for special measures if the quality of their evidence is likely to be diminished because of that illness, disability or disorder.</p> <p>On the basis of these recommendations, the Commission considers that the proposed policy creates a differential impact on the basis of disability. However, this differential impact is considered to be justifiable since it creates a positive outcome as the policy promotes the participation of witnesses in civil proceedings who may be living with a variety of disabilities, illnesses and disorders.</p> <p>The Commission's recommendations to modernise the law on the competence of witnesses to give evidence in civil proceedings creates a positive impact on those living with disability. By putting emphasis on a person's ability to understand questions and be understood when giving answers (with the necessary assistance by trained professional such as intermediaries) allows greater access to court proceedings and increases the opportunity</p>	Minor

	to participate.	
Dependants	The Commission does not consider that its proposed policy has a differential impact on people with or without dependants on the basis that applicants for special measures in civil proceedings will be able to avail of those protections regardless of whether they have caring responsibilities.	None.

2. Are there opportunities to better promote equality of opportunity for people within the section 75 equality categories?

Section category	75	If Yes , provide details	If No , provide reasons
Religious belief			No. People of different religious beliefs already have access to justice in Northern Ireland.
Political opinion			No. People of different political opinions already have access to justice in Northern Ireland.
Racial group			No. People identifying with different racial groups already have access to justice in Northern Ireland.
Age		Yes. The Commission recognises that children face particular difficulties when required to give evidence in court. The Commission considers that this policy enhances the equality of opportunity for children in the court process by offering them the opportunity to participate more fully in the process, whilst ensuring that they receive the appropriate protections whilst doing so.	
Marital status			No. People of any marital (or civil partnership) status

		already have access to justice in Northern Ireland.
Sexual orientation		No. People of any sexual orientation already have access to justice in Northern Ireland.
Men and women generally		No. Men and women already have access to justice in Northern Ireland.
Disability	Yes. The Commission recognises that witnesses living with mental illness, a learning disability, or with a physical disability or disorder may experience particular difficulty when presenting evidence in civil proceedings. The Commission considers that this policy enhances the equality of opportunity for these witnesses in the court process by offering them the opportunity to participate more fully in the process, whilst ensuring that they receive the appropriate protections whilst doing so.	
Dependants		No. People in Northern Ireland have access to justice regardless of whether they have dependants or not.

3. To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?

Good relations category	Details of policy impact	Level of impact minor/major/none
Religious belief	The Commission does not consider that this policy is likely to impact on good relations between people of different religious beliefs.	None.
Political opinion	The Commission does not consider that this policy is likely to impact on good relations between people of different political opinions.	None.

Racial group	The Commission does not consider that this policy is likely to impact on good relations between people of different racial groups.	None.
--------------	--	-------

4. Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

Good relations category	If Yes , provide details	If No , provide reasons
Religious belief		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people of different religious beliefs.
Political opinion		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people of different political opinions.
Racial group		No, the subject matter of this policy does not lend an opportunity to better promote good relations between people from different racial groups.

Additional considerations

Multiple identity

Generally speaking, people can fall into more than one Section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities?

(For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).

The Commission has considered the possibility that a person who falls into more than one Section 75 category may apply to avail of special measures. However, it does not consider that there are any potential impacts of the policy on people with multiple identities.

Provide details of data on the impact of the policy on people with multiple identities. Specify relevant Section 75 categories concerned.

Not applicable.

Part 3. Screening decision

If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

The Commission has decided that it will not be necessary to conduct an Equality Impact Assessment in relation to this policy. Although there are impacts on a number of Section 75 groups, they are minor in nature, entirely positive and serve to enhance the opportunities of these groups to access justice.

If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

The Commission is content that because the impacts of this policy on Section 75 groups are entirely positive, the policy does not require to be mitigated against or to be replaced with an alternative policy.

If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

Not applicable.

Mitigation

Can the policy/decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and/or good relations?

The Commission considers that because the impacts of this policy on Section 75 groups are entirely positive, the policy does not require to be mitigated against or to be replaced with an alternative policy.

Timetabling and prioritising

Factors to be considered in timetabling and prioritising policies for equality impact assessment.

Not applicable.

Part 4. Monitoring

The Commission is not responsible for monitoring the effect of this policy as this is the responsibility of the implementing Department.
--

CHAPTER 7. REGULATORY IMPACT ASSESSMENT

1. Title of Proposal

The title for this proposal is “Protections for witnesses giving evidence in civil proceedings”.

2. Purpose and intended effect of measure

(i) The objective

The objective of this measure is to create a coherent and easily accessible statutory regime for enabling certain witnesses to access protections whilst giving evidence in civil proceedings in Northern Ireland. The witnesses who will benefit from this measure are children, people living with learning disabilities or mental ill-health and those living with physical disabilities or disorders. Witnesses who are in such fear and distress about giving evidence that the quality of their evidence will be diminished will also benefit. The measure also makes provision to update the law on the competence of a witness to give evidence in civil proceedings.

(ii) The background

Traditionally, witnesses are expected to give evidence to a court orally and in person. In civil proceedings, legislation, court rules and court practice allows other methods of giving evidence, however, the current law is not easily accessible, nor understandable, for the court user. These alternative methods have not been designed to take account of the needs of the particular court user: in many instances the alternative methods of giving evidence appear to have been developed to be convenient to the court. In criminal proceedings, a coherent and transparent system has been developed in the Criminal Evidence (Northern Ireland) Order 1999 to assist witnesses with particular needs to seek protection from the court. It is now proposed that a similar system is adopted for civil proceedings. Where the issue of a witness's competence to give evidence in civil proceedings is concerned, it is proposed to update the law to remove unfairness to some witnesses, which has arisen as a result of historical case-law.

(iii) Risk assessment

It is difficult to quantify the numbers of children and people with learning disabilities, mental ill-health or physical disability who use the civil courts in Northern Ireland.

However, the Northern Ireland Court Service Customer Exit Surveys 2007/2008 and 2009 reveal that 7.5% of civil court users consider that they have a disability as defined by the Disability Discrimination Act 1995. More generally, statistics published by the Northern Ireland Statistics and Research Agency in *The Prevalence of Disability and Activity Limitations amongst adults and children living in private households in Northern Ireland* (Bulletin 1 July 2007) show that 18% of all people living in private households in Northern Ireland experience some degree of disability. Unfortunately, it is not possible to determine the numbers of people who are in fear and distress about giving evidence in civil proceedings, nor is it possible to identify the numbers of children who give evidence to courts in Northern Ireland, as that data is not currently collected. This proposed measure is designed to encourage the participation of children, people living with learning disabilities, mental ill-health or physical disability and those in fear and distress in connection with giving evidence in the court process and improve these witnesses' experience of the justice system in Northern Ireland.

3. Options

Option 1: Do nothing

The Commission considers that doing nothing is not an option. The current law in relation to protections for witnesses who are required to give evidence in civil proceedings is confused and not easily accessible, nor understandable for the average court user. The current law is contained in legislation, court rules and practice directions and has not evolved as a coherent attempt to offer assistance to witnesses. Instead, often the provisions appear to have been developed for the convenience of court procedure. The Commission considers that the current law relating to the competence of witnesses to give evidence in civil proceedings seems outdated and unfair.

Option 2: Address current deficiencies in the law by practical means

This option is not viable. Substantive issues need to be addressed in order to offer protection to witnesses who are required to give evidence in civil proceedings. In the Commission's view, there is no *vires* for court rules to be made to address the needs of witnesses and court practice directions cannot deal with substantive issues of law either. For example, legislation is required to define which witnesses can avail of protections, as well as the occasions when the protections can be utilised. Also, court rules and practice directions are not open to the same scrutiny as primary legislation.

The competence of witnesses to give evidence in civil proceedings cannot be dealt with by practical means.

Option 3: Address current deficiencies in the law by a legislative route

This option is the one which is preferred by the Commission. A legislative approach will be able to deal with substantive matters of law, as well as enabling the Northern Ireland Assembly to fully scrutinise the measures being recommended by the Commission. A legislative route also has the benefit of creating a coherent body of law and encouraging a consistent approach in courts across Northern Ireland.

4. Benefits

Option 3: It is anticipated that this measure will offer protection for certain witnesses who are required to give evidence in civil proceedings. If these protections are available, it is anticipated that witnesses who are eligible for them will experience greater confidence in the justice system. Updating the law on competence to give evidence in civil proceedings will remove outdated and unfair case-law, again encouraging confidence in the justice system. It is not easy to quantify a concept such as greater confidence in the justice system, however, people who have a better experience of giving evidence in civil proceedings will in all likelihood be more likely to engage with the justice system in the future, which will have benefits for both the civil and criminal justice systems. This engagement will have a benefit to society as a whole.

Business sectors affected

This measure has no impact on business sectors.

Other Impact Assessments

An Equality Impact screening exercise has been carried out in relation to this measure and is contained in this report at chapter 6.

5. Costs

(i) Compliance costs

Where costs are concerned, the Commission is not best placed to assess the cost of implementing its proposals. However, the Commission can offer some views which may assist the relevant authorities who may implement its recommendations. It is unlikely that large numbers of witnesses will seek to use protective measures. The Commission considers that family law cases, especially those involving domestic violence, will be the type of case where protective measures are most frequently sought. Witnesses who are living with physical or learning disabilities or mental ill-health may also seek to use protective measures in the cases which they are involved in. Those who are in fear and distress about giving evidence may also seek to use the measures. The Commission has recommended that children should be allowed to use protective measures automatically, although there should be an option to allow children to opt out of using them. It is very difficult to quantify the demand for protective measures in civil proceedings, however, some of the protective measures being recommended by the Commission are cost neutral or low cost, for example, the removal of wigs and gowns in proceedings and the use of screens.

Other protective measures being recommended by the Commission are not cost neutral. The use of live television link, intermediaries, aids to communication and supporters all have a cost to the public purse. However, use can be made of existing provision which has been made for the criminal justice system, upon which these recommendations have been based. There is a wide availability of live television link in courts across Northern Ireland: 5 courtrooms in Belfast, 3 courtrooms in Antrim, 2 courtrooms in each of Coleraine, Dungannon, Craigavon and the Royal Courts of Justice and one courtroom in each of Ballymena, Omagh, Enniskillen, Newtownards, Downpatrick, Newry and Armagh are fitted out with the necessary equipment. It is anticipated that if careful listing of civil cases in which witnesses are eligible for live television link takes place, then roll-out of this policy without further investment can be achieved. However, if demand outstrips current provision, then additional funding will be required.

The use of intermediaries is to be rolled out in criminal proceedings in Northern Ireland: the Commission anticipates that the individuals who are identified to provide this service in the criminal courts could also provide the service for witnesses in civil courts.

Although the costs of these individuals would still need to be met, training and procurement costs could be avoided if this approach was taken.

Where supporters are concerned, the Commission has suggested that Government considers the model created in the criminal law, where services are provided by a combination of trained volunteers and social services. This approach is not cost neutral and requires government investment and the Commission has suggested that it may be more effective for the current model which exists in criminal proceedings to be extended to include civil proceedings.

It should also be noted that costs will be incurred in training members of the judiciary and legal professions in relation to any changes in the law. However, training can use the channels which already exist, such as the Judicial Studies Board and use of publications which are produced by the Law Society of Northern Ireland and the Bar Council of Northern Ireland.

(ii) Other costs

It is not anticipated that there are other costs associated with this measure.

(iii) Costs for a typical business

There are no costs to business.

6. Consultation with small business: the Small Business Impact Test

There is no impact on small business, however, representative groups were included in the consultation exercise.

7. Enforcement and sanctions

This measure offers protections to certain witnesses and therefore assists them to access justice. As it is a facilitative measure, no enforcement is necessary.

8. Monitoring and review

If the recommendations of the Commission are accepted by Government, the relevant Department will take forward legislation through the Northern Ireland Assembly and will be responsible for the monitoring and review of its operation.

9. Consultation

(i) Within Government

All Government Departments and Ministers were appraised of the consultation process, as were MLAs and the Northern Ireland Assembly Committees.

(ii) Public consultation

A wide variety of voluntary sector organisations, representative groups and interested parties within the legal profession were consulted in relation to this measure. Groups of children and young people were also consulted by the Commission. All but one of the consultees who responded were in favour of the measure which is being proposed by the Commission. Further details in relation to the consultation response are included in the Report.

10. Summary and recommendation

The Commission considers that legislation which creates a number of protective measures for certain witnesses in civil proceedings who may find difficulties giving oral evidence is the preferred approach. Although there are undoubtedly costs attaching to this measure, it is the view of the Commission that the benefits to the justice system and the protection of witnesses outweigh these.

Civil Evidence (Witnesses) Bill

Contents

PART 1 SPECIAL MEASURES TO ASSIST WITNESSES GIVING EVIDENCE

Application of this Part

1. Application of this Part

Eligibility of witnesses for special measures

2. Eligibility on grounds of incapacity
3. Eligibility on grounds of fear or distress about testifying
4. Eligibility of child witnesses
5. Types of special measure available to eligible witnesses

Special measures direction

6. Test for giving special measures direction
7. Child witnesses and live link: test for special measures direction
8. Child witnesses and live link: opt-outs
9. Procedure for special measures direction
10. Availability of facilities for special measures

Special measures

11. Screens
12. Evidence by live link
13. Live link: supporters
14. Removal of wigs and gowns
15. Examination of witness through intermediary
16. Intermediaries: application of law of perjury
17. Aids to communication

Special case: video recording of evidence in chief in Children Order proceedings

18. Application of provisions on video recording
19. Special measure: video recording of evidence in chief
20. Test for giving special measures direction for video recording
21. Video recording and intermediaries

Miscellaneous

22. Status of evidence given in accordance with special measures direction
23. Status of evidence given in accordance with special measures direction:
perjury
24. Rules of court
25. Savings
26. Interpretation of this Part

PART 2
COMPETENCE OF WITNESSES AND CAPACITY TO BE SWORN

Application of this Part

27. Application of this Part

Competence of witnesses

28. Competence of witness to give evidence

29. Determining competence of witnesses

Giving of sworn or unsworn evidence

30. Determining whether witness to be sworn

31. Reception of unsworn evidence

32. Offence of giving false unsworn evidence

PART 3
FINAL PROVISIONS

33. General supplementary provisions

34. Orders and regulations

35. Interpretation

36. Consequential amendments

37. Repeals

38. Short title and commencement

SCHEDULES:

Schedule 1 Minor and consequential amendments

Schedule 2 Repeals

A
BILL

TO

Provide for special measures to assist certain categories of witness in giving evidence in civil proceedings and to amend the law relating to competence of witnesses in such proceedings.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

PART 1
SPECIAL MEASURES TO ASSIST WITNESSES GIVING EVIDENCE

Application of this Part

Application of this Part

1. – (1) This Part applies to-
- (a) civil proceedings before any court or other tribunal, in relation to which the strict rules of evidence apply, and
 - (b) Children Order proceedings.
- (2) This Part applies in respect of all witnesses giving evidence in those proceedings, whether or not the witness is a party to those proceedings.
- (3) In this Part-
- (a) a witness is an eligible witness if the witness is eligible for assistance in giving evidence under sections 2, 3 or 4,
 - (b) an eligible witness may be granted the assistance of a special measure by way of a special measures direction given under sections 6 to 10 (or sections 18 to 21, where those sections apply).

Eligibility of witnesses for special measures

Eligibility on grounds of incapacity

2. – (1) A witness is eligible for assistance in giving evidence if the court considers that the quality of evidence given by the witness is likely to be diminished because-
- (a) the witness-

- (i) suffers from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986,
- (ii) suffers from a personality disorder, or
- (iii) otherwise has a significant impairment of intelligence and social functioning, or
- (b) the witness has a physical disability or is suffering from a physical disorder.

(2) In determining whether a witness falls within subsection (1) the court must take into account any views expressed by the witness.

Eligibility on grounds of fear or distress about testifying

3. - (1) A witness is eligible for assistance in giving evidence if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1), the court must take into account-

- (a) the matters referred to in subsection (3),
- (b) any of the matters referred to in subsection (4) that the court considers relevant.
- (3) Those matters are-
 - (a) the nature and alleged circumstances of the matter to which the proceedings relate,
 - (b) the nature of the evidence the witness is likely to give,
 - (c) the age of the witness,
 - (d) any relationship between the witness and any party to the proceedings,
 - (e) the behaviour towards the witness of-
 - (i) any party,
 - (ii) family members or associates of any party,
 - (iii) any other person who is likely to be a party or a witness, and
 - (f) any views expressed by the witness.
- (4) Those matters are-

- (a) the racial group of the witness,
- (b) the domestic and employment circumstances of the witness,
- (c) any religious beliefs or political opinions of the witness,
- (d) the sexual orientation of the witness, and
- (e) any other matter that the court considers relevant.

(5) In this section “racial group” has the meaning given in Article 5 of the Race Relations (Northern Ireland) Order 1997.

Eligibility of child witnesses

4.- (1) A witness who is a child at the time of the hearing is eligible for assistance in giving evidence.

(2) In this section “time of the hearing” means the time when it falls to the court to make a determination under section 6.

(3) A child witness loses this eligibility when the child attains the age of 18, unless the child has already begun to give evidence.

Types of special measure available to eligible witnesses

5. (1) The following special measures are available in relation to witnesses who are eligible for assistance on the grounds of incapacity under section 2, or age under section 4-

- (a) screens under section 11,
- (b) evidence by live link under section 12,
- (c) removal of wigs and gowns under section 14,
- (d) examination through an intermediary under section 15, and
- (e) aids to communication under section 17.

(2) The following special measures are available in relation to witnesses who are eligible for assistance on the grounds of fear or distress under section 3-

- (a) screens,
- (b) evidence by live link, and
- (c) removal of wigs and gowns.

(3) The availability of the special measure of video recording of evidence in chief is a special case and is dealt with in sections 18 to 21.

Special measures direction

Test for giving special measures direction

6. - (1) Where the court determines that a witness is eligible for assistance by virtue of sections 2, 3 or 4, the court must then-

- (a) determine whether any special measure (or combination of them) would, in its opinion be likely to improve the quality of evidence given by the witness, and
- (b) if so-
 - (i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence, and
 - (ii) give a special measures direction providing for the measure or measures to apply to evidence given by the witness.

(2) In making a determination under subsection (1), the court must consider all the circumstances of the case including, in particular-

- (a) any views expressed by the witness, and
- (b) whether the measure might tend to inhibit any evidence being effectively tested by a party to the proceedings.

Child witnesses and live link: test for special measures direction

7. - (1) This section applies to child witnesses.

(2) Notwithstanding the test in section 6, the court must first give a special measures direction for the child's evidence to be given by live link in accordance with section 12, but this is subject to-

- (a) subsection (3), and
- (b) section 8(1).

(3) Subsection (2) does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the child's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the child would have that result or for any other reason).

(4) After applying subsection (2), the court must then apply the test in section 6 in respect of any other special measures that are available in relation to the child.

Child witnesses and live link: opt-outs

8. - (1) Subject to the agreement of the court, a child witness can opt out of live link if granted under section 7.

(2) Where the child opts out in accordance with subsection (1) then, notwithstanding the test in section 6, the court must then give a special measures direction for the child to give evidence from behind a screen in accordance with section 11, but this is subject to-

- (a) subsection (3), and
- (b) subsection (4).

(3) Subsection (2) does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the child's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the child would have that result or for any other reason).

(4) Subject to the agreement of the court, a child witness can opt out of screens if granted under subsection (2).

(5) The court can only agree to an opt-out (either from live link or screens) if satisfied that the opt-out is not likely to diminish the quality of the child's evidence, and in making this decision the court must consider-

- (a) the age and maturity of the child,
- (b) the ability of the child to understand the consequences of giving evidence without those special measures,
- (c) the best interests of the child,
- (d) the views of the child's parents, or anyone with parental responsibility for the child,
- (e) the relationship (if any) between the child and any party to the proceedings,
- (f) the nature and alleged circumstances of the matter to which the proceedings relate, and
- (g) any other factor that the court considers relevant.

(6) After applying subsection (2), the court must then apply the test in section 6 in respect of all special measures (other than live link and screens) that are available in relation to the child.

Procedure for special measures direction

9. - (1) A special measures direction may be given-

- (a) following an application by any party to the proceedings, or
- (b) of the court's own motion.

(2) The direction must specify the particulars of each special measure to which it relates.

(3) A direction has binding effect from the time it is given until the time the proceedings for the purpose of which it is given are determined, abandoned or discontinued.

(4) The court may discharge or vary a direction if it appears to the court to be in the interests of justice to do so, and may do so either-

- (a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or
- (b) of its own motion.

(5) In subsection (4) "the relevant time" means-

- (a) the time when the direction was given, or
- (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(6) Nothing in section 12(2) and (3), section 19(4) and (5) and section 20(3) is to be regarded as affecting the power of the court to vary or discharge a direction under subsection (4).

Availability of facilities for special measures

10. – (1) A court can only grant a special measure if suitable facilities for that special measure are available in the court-house in which the court is due to sit.

(2) The court may lawfully sit, for the purposes of the whole or any part of the proceedings, at any other court-house which does have suitable facilities.

Special measures

Screens

11. - (1) A special measures direction may provide for the witness, while giving evidence, to be prevented by means of a screen or other arrangement from seeing any party specified in the direction.

(2) The screen or other arrangement must not prevent the witness from being able to see, and to be seen by-

- (a) the judge and the jury (if there is one),

- (b) legal representatives acting in the proceedings, and
- (c) any interpreter or other person appointed (in pursuance of a direction or otherwise) to assist the witness.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

Evidence by live link

12. - (1) A special measures direction may provide for the witness to give evidence by means of a live link.

(2) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the court.

(3) The court may give permission for the purposes of subsection (2) if it appears to the court to be in the interests of justice to do so, and may do so either-

- (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or
- (b) of its own motion.

(4) In subsection (3) “the relevant time” means-

- (a) the time when the direction was given, or
- (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(5) In this Part “live link” means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by-

- (a) the judge and the jury (if there is one),
- (b) legal representatives acting in the proceedings, and
- (c) any interpreter or other person appointed (in pursuance of a direction or otherwise) to assist the witness.

Live link: supporters

13. - (1) A special measures direction under section 12 may also provide for a specified person to accompany the witness while the witness is giving evidence by live link.

(2) In determining who may accompany the witness, the court must take into account any views expressed by the witness.

Removal of wigs and gowns

14. - A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence.

Examination of witness through intermediary

15. - (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through a person approved by the court for the purposes of this section ("an intermediary").

(2) The function of an intermediary is to communicate-

- (a) to the witness, questions put to the witness, and
- (b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(3) Any examination of the witness must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which-

- (a) the judge and legal representatives are able to see and hear the examination of the witness and to communicate with the intermediary, and
- (b) the jury (if there is one) are able to see and hear the examination of the witness.

(4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that the person will faithfully perform the functions of intermediary.

(6) The Department of Justice may by regulations, made subject to negative resolution, make provision as to-

- (a) the persons who may act as intermediaries, and
- (b) the conduct and standards expected of them.

Intermediaries: application of law of perjury

16. - (1) Article 3 of the Perjury (Northern Ireland) Order 1979 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding.

(2) For the purposes this section, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that Article, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

Aids to communication

17. - (1) A special measures direction may provide for the witness, while giving evidence (whether in court or otherwise) to be provided with an aid to communication.

(2) An aid to communication is any device that the court considers appropriate for enabling communication with the witness despite any disability or disorder or other impairment which the witness has or suffers from.

Special case: video recording of evidence in chief in Children Order proceedings

Application of provisions on video recording

18. - (1) This section and sections 19 to 21 apply where -

- (a) the witness is a child,
- (b) the proceedings are Children Order proceedings, and
- (c) the child is the subject of the proceedings.

(2) Nothing in this section and sections 19 to 21 affects the admissibility of any video recording which would be admissible apart from these sections.

(3) Sections 9 and 10 apply to the special measure of video recording as they apply to all other special measures.

(4) In this Part "video recording" means any recording, on any medium, from which a moving image may by any means be produced, and includes the accompanying sound-track.

Special measure: video recording of evidence in chief

19. - (1) In this Part, a special measures direction for video recording means a direction for a video recording of an interview with a child to be admitted as evidence in chief of the child.

(2) Where a special measures direction for video recording is given, any evidence given by the witness which is not given by means of a video recording must be given by means of a live link in accordance with a special measures direction under section 12.

(3) A direction given in accordance with subsection (2) may include provision for specified persons to accompany the witness in accordance with section 13.

(4) Where a recording is admitted -

- (a) the witness must be called by the party tendering it in evidence, unless the parties have agreed that there is no need for the witness to be called, and
- (b) the witness must not give evidence in chief otherwise than by means of the recording-
 - (i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded evidence, or
 - (ii) without the permission of the court, as to any other matter which, in the opinion of the court, is dealt with in that evidence.

(5) The court may give permission for the purposes of subsection (4)(b)(ii) if it appears to the court to be in the interests of justice to do so, and may do so either-

- (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or
- (b) of its own motion.

(6) In subsection (5) "the relevant time" means-

- (a) the time when the direction was given, or
- (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

Test for giving special measures direction for video recording

20. - (1) Notwithstanding the tests in sections 6 and 7, the court must give a special measures direction for video recording if it considers it appropriate to do so, having regard to all the circumstances of the case.

(2) The court may subsequently refuse to admit all or part of the recording in the interests of justice, in particular having regard to any prejudice it may cause to the interests of any party.

(3) The court may subsequently refuse to admit the recording if-

- (a) it appears to the court that-
 - (i) the witness will not be available for cross-examination by live link under section 19(2), and
 - (ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available, or
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(4) If, after applying the test in subsection (1), the court determines to give a special measures direction for video recording, the court must then apply the test in section 6 in respect of the special measures of-

- (a) removal of wigs and gowns,
- (b) aids to communication.

(5) If, after applying the test in subsection (1), the court determines not to give a special measures direction for video recording, the court must then apply section 7.

(6) Where the court has only admitted part of the recording in accordance with subsection (2), references in subsection (3) and section 19(4) to the recording or to the witness's evidence are references to the part of the recording or evidence which is to be admitted.

Video recording and intermediaries

21. - (1) Section 15(1) does not apply to an interview of the witness which is recorded by means of a video recording, but this is subject to subsection (2).

(2) A special measures direction given under section 20 may provide for a video recording to be admitted under that section if the interview was conducted through an intermediary and-

- (a) the intermediary complied with section 15(5) before the interview began, and
- (b) the court's approval for the purposes of section 15 was given before the direction is given.

Miscellaneous

Status of evidence given in accordance with special measures direction

22. - Evidence given by a witness in accordance with a special measures direction shall be treated as if given by the witness in direct oral evidence in court.

Status of evidence given in accordance with special measures direction: perjury

23.- (1) Where any statement made by a person on oath in any proceeding which is not a judicial proceeding for the purposes of Article 3 of the Perjury (Northern Ireland) Order 1979 (perjury) is received in evidence in pursuance of a special measures direction, that proceeding shall be taken for the purposes of that Article to be part of the judicial proceeding in which the statement is so received in evidence.

(2) Where in any proceeding which is not a judicial proceeding for the purposes of that Order-

- (a) a person wilfully makes a false statement otherwise than on oath which is subsequently received in evidence in pursuance of a special measures direction, and

- (b) the statement is made in such circumstances that had it been given on oath in any such judicial proceeding that person would have been guilty of perjury,

that person shall be guilty of an offence and liable to any punishment which might be imposed on conviction of an offence under section 32(2).

(3) In this section “statement” includes any representation of fact, whether made in words or otherwise.

Rules of court

24. - Rules of court may make provision-

- (a) for uncontested applications for special measures directions to be determined by the court without a hearing,
- (b) for preventing the renewal of an unsuccessful application for a direction except where there has been a material change of circumstances,
- (c) for documentary evidence or expert evidence to be given in connection with an application for, or for varying or discharging, a direction,
- (d) for the manner in which confidential or sensitive information is to be treated in connection with an application and in particular as to its being disclosed to, or withheld from, a party to the proceedings.

Savings

25. - (1) Nothing in this Part affects the power of the court under Article 168 of the Children (Northern Ireland) Order 1995 (power to clear court while child giving evidence).

(2) Nothing in this Part is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)-

- (a) in relation to a witness who is not an eligible witness, or
- (b) in relation to an eligible witness where the order is made or leave is given otherwise than by reason of the fact that the witness is an eligible witness (for example, in a case where a foreign language interpreter is provided).

(3) Nothing in this Part affects any power of a court to exclude evidence at its discretion (whether by preventing questions being put or otherwise) which is exercisable apart from this Part.

(4) Nothing in this Part affects the operation of any rule of law relating to evidence in civil proceedings.

Interpretation of this Part

26.- (1) In this Part-

“child” means any person under the age of 18,

“eligible witness” means a witness eligible for assistance in giving evidence under sections 2, 3 or 4,

“family proceedings rules” means family proceedings rules made under Article 12 of the Family Law (Northern Ireland) Order 1993,

“live link” has the meaning given in section 12,

“rules of court” includes magistrates’ courts rules, county court rules, family proceedings rules or rules made under section 55 of the Judicature (Northern Ireland) Act 1978,

“special measures direction” means a direction given under section 6, and also includes a direction given under-

(a) section 7(2),

(b) section 8(2), and

(c) section 20,

where those sections apply,

“video recording” has the meaning given in section 18.

(2) In this Part-

(a) references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy, and

(b) for this purpose, “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

(3) In this Part references to a witness giving evidence includes the witness-

(a) giving testimony, and

(b) being sworn in.

(4) In this Part references to a person being able to see or hear, or be seen or heard by, another person are to be read as not applying to the extent that either of them is unable to see or hear by reason of any impairment of eyesight or hearing.

PART 2
COMPETENCE OF WITNESSES AND CAPACITY TO BE SWORN

Application of this Part

Application of this Part

27. - This Part applies to-

- (a) civil proceedings, before any court or other tribunal, in relation to which the strict rules of evidence apply, and
- (b) Children Order proceedings.

Competence of witnesses

Competence of witness to give evidence

28. - (1) All persons are (whatever their age) competent to give evidence, but this is subject to subsection (2).

(2) A person is not competent to give evidence if it appears to the court that the person is unable to-

- (a) understand questions put to the person as a witness, and
- (b) give answers to them which can be understood.

Determining competence of witnesses

29. - (1) Any question whether a witness is competent to give evidence in proceedings, whether raised-

- (a) by a party to the proceedings, or
- (b) by the court of its own motion,

shall be determined by the court in accordance with this section.

(2) It is for the party calling the witness to satisfy the court that the witness is competent to give evidence in the proceedings.

(3) In determining the question mentioned in subsection (1) the court shall treat the witness as having the benefit of any special measures direction under Part 1 that the court has given, or proposes to give, in relation to the witness.

(4) Any proceedings held for the determination of the question shall take place in the absence of the jury (if there is one).

(5) Expert evidence may be received on the question.

(6) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

Giving of sworn or unsworn evidence

Determining whether witness to be sworn

30. - (1) A witness must not be sworn for the purposes of giving evidence on oath unless the witness-

- (a) has attained the age of 14, and
- (b) has a sufficient appreciation of-
 - (i) the solemnity of the occasion, and
 - (ii) the particular responsibility to tell the truth which is involved in taking an oath.

(2) Any question whether the witness may be sworn, whether raised-

- (a) by a party to the proceedings, or
- (b) by the court of its own motion,

shall be determined by the court in accordance with this section.

(3) The witness shall, if able to give intelligible testimony, be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party).

(4) If any such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the court that the witness has attained the age of 14 and has a sufficient appreciation of the matters mentioned in subsection (1)(b).

(5) Any proceedings held for the determination of the question mentioned in subsection (2) shall take place in the absence of the jury (if there is one).

(6) Expert evidence may be received on the question.

(7) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

(8) For the purposes of this section a person is able to give intelligible testimony if the person is able to-

- (a) understand questions put to the person as a witness, and
- (b) give answers to them that can be understood.

Reception of unsworn evidence

31. - (1) Subsections (2) and (3) apply to a person (of any age) who-

- (a) is competent to give evidence, but

(b) (by virtue of section 30(1)) is not permitted to be sworn for the purpose of giving evidence on oath.

(2) The evidence of a person to whom this subsection applies shall be given unsworn.

(3) A deposition of unsworn evidence given by a person to whom this subsection applies may be taken as if that evidence had been given on oath.

(4) A court shall accordingly receive in evidence any evidence given unsworn in pursuance of subsection (2) or (3).

Offence of giving false unsworn evidence

32. - (1) This section applies where a witness gives unsworn evidence in pursuance of section 31(2) or (3).

(2) If the witness wilfully gives false evidence in such circumstances that, had the evidence been given on oath, the witness would have been guilty of perjury, the witness shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale.

PART 3 FINAL PROVISIONS

General supplementary provisions

33. - (1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Act (and nothing in this Act shall be taken to affect the generality of any statutory provision conferring power to make such rules).

(2) For the purposes of this Act the age of a person shall be taken to be that which it appears to the court to be after considering any available evidence.

Orders and regulations

34. - Any order or regulations made by the Department of Justice or the Department of Finance and Personnel under this Act may make such supplemental, incidental, consequential or transitional provision or savings as that Department considers appropriate.

Interpretation

35. - (1) In this Act-

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33), and

“witness” means any person called, or proposed to be called, to give evidence.

(2) In this Act “Children Order proceedings” means proceedings for any of the following orders under the Children (Northern Ireland) Order 1995-

- (a) contact order,
- (b) prohibited steps order,
- (c) residence order,
- (d) specific issue order,
- (e) care order,
- (f) supervision order,
- (g) emergency protection order,
- (h) child assessment order,
- (i) education supervision order, and
- (j) family assistance order.

Consequential amendments

36. - The statutory provisions mentioned in Schedule 1 have effect with the minor and consequential amendments specified there.

Repeals

37. - The statutory provisions mentioned in Schedule 2 are repealed to the extent specified there.

Short title and commencement

38.- (1) This Act may be cited as the Civil Evidence (Witnesses) Act (Northern Ireland) 20__.

(2) This Act shall come into operation on such day or days as the Department of Finance and Personnel may by order appoint.

SCHEDULES

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

Section 36

The Evidence Act 1851 (c. 99)

1.- (1) Section 2 of the Evidence Act 1851 (competence and compellability of parties to proceedings as witnesses) is amended as follows.

(2) The existing provision is numbered as subsection (1).

(3) After that subsection insert-

“(2) Subsection (1) is subject to Part 2 of the Civil Evidence (Witnesses) Act (Northern Ireland) 20__ (competence of witnesses to give evidence).”.

The Civil Evidence (Northern Ireland) Order 1997 (NI 21)

2. - For Article 6(2) of the Civil Evidence (Northern Ireland) Order 1997 (competence of a witness) substitute-

“(2) In paragraph (1) competence of a witness shall be construed in accordance with section 28 of the Civil Evidence (Witnesses) Act (Northern Ireland) 20__.”.

SCHEDULE 2

REPEALS

Section 37

Short Title	Extent of repeal
The Children (Northern Ireland) Order 1995 (NI 2).	Article 169(3) and (4).

CIVIL EVIDENCE (WITNESSES) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared in order to assist the reader of the Bill and to help inform debate on it.

2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY INITIATIVES

Background to the proposals

3. The Bill is intended to provide a framework for enabling certain witnesses in civil proceedings to use “special measures”. Special measures are protections which were created under the Criminal Evidence (Northern Ireland) Order 1999 which are designed to assist certain witnesses when they are giving evidence in criminal proceedings.

4. It is not considered that the current law in Northern Ireland provides adequate protection for those witnesses who may experience difficulties when giving oral testimony in civil proceedings. The protections available under the current law and practice in Northern Ireland have not evolved in a coherent and transparent manner. The objective of the Bill is to enable such witnesses to provide their best evidence by ensuring that they can avail of the protection they need. It is considered that statutory provision for a scheme of special measures, like that contained in the criminal law, is the best way to achieve this objective.

Purpose of Bill and summary of main provisions

5. The purpose of the Bill is to establish a comprehensive and accessible framework of special measures in civil proceedings.

CONSULTATION

6. The Northern Ireland Law Commission (“the Commission”) issued a consultation paper entitled “Vulnerable Witnesses in Civil Proceedings” on 1 April 2010 to a wide range of individuals, organisations and professionals. The objective was to discover whether consultees considered that existing protections available for witnesses giving evidence in civil proceedings are adequate and whether special measures which are available to certain witnesses in criminal proceedings by virtue of the Criminal Evidence (Northern Ireland) Order 1999, should be made available to certain witnesses in civil proceedings. Consultees were also asked for their views on eligibility of witnesses for special measures and on the types of special measure which should be available. The related issue of competence to give evidence in civil proceedings was also addressed.

7. The Commission received a number of detailed responses to the consultation paper. In addition to these responses, the Commission engaged in stakeholder meetings, including with groups representing the views of children and young people.

8. The conclusion of the Commission, supported by consultees, was that more protections are needed for certain witnesses than are currently available. The Commission's recommendations form the basis of this Bill.

OPTIONS CONSIDERED

9. Option 1: Do nothing

The Commission considered that doing nothing was not an option. The current law in relation to protections for witnesses who are required to give evidence in civil proceedings is confused and not easily accessible, nor understandable for the average court user. The current law is contained in legislation, court rules and practice directions and has not evolved as a coherent attempt to offer assistance to witnesses. Instead, often the provisions appear to have been developed for the convenience of court procedure. The Commission considered that the current law relating to the competence of witnesses to give evidence in civil proceedings seems outdated and unfair.

Option 2: Address current deficiencies in the law by practical means

This option was not viable. Substantive issues needed to be addressed in order to offer protection to witnesses who are required to give evidence in civil proceedings. In the Commission's view, there are no *vires* for court rules to be made to address the needs of witnesses and court practice directions cannot deal with substantive issues of law either. For example, legislation is required to define which witnesses can avail of protections, as well as the occasions when the protections can be utilised. Also, court rules and practice directions are not open to the same scrutiny as primary legislation. The competence of witnesses to give evidence in civil proceedings also cannot be dealt with by practical means.

Option 3: Address current deficiencies in the law by a legislative route

This option was the one which was preferred by the Commission. A legislative approach will be able to deal with substantive matters of law, as well as enabling the Northern Ireland Assembly to fully scrutinise the measures being recommended by the Commission. A legislative route also has the benefit of creating a coherent body of law and encouraging a consistent approach in courts across Northern Ireland.

OVERVIEW

The Bill has 38 clauses and 2 Schedules. A commentary on each of the clauses and Schedules follows below. However, where a clause or part of a clause or Schedule does not seem to require an explanation, none is given.

COMMENTARY ON CLAUSES

Clause 1: Application of this Part

This clause defines the type of civil proceedings to which the provisions relating to the availability of special measures for witnesses applies. It also makes provision in relation to those who may be regarded as an "eligible witness" for the purposes of the protections contained in the Bill.

Clause 2: Eligibility on grounds of incapacity

This clause defines a number of categories of witnesses who may be eligible for special measures when giving evidence in civil proceedings.

Clause 3: Eligibility on grounds of fear or distress about testifying

This clause provides that witnesses, the quality of whose evidence may be diminished because they are suffering from fear and distress in connection with testifying, may be eligible for special measures when giving evidence in civil proceedings. The clause also makes provision for the issues which the court should take into account when determining whether to grant special measures to a witness in these circumstances.

Clause 4: Eligibility of child witnesses

This clause provides that children under the age of eighteen are eligible for special measures.

Clause 5: Types of special measure available to eligible witnesses

This clause provides for the special measures which are available to each of the categories of witness described in clauses 2 to 4 above.

Clause 6: Test for giving special measures direction

This clause sets out the test which must be applied by the court when determining the special measures to which an eligible witness may be entitled. If it is determined that the test has been met, the court can order that special measures can be used by the witness. This order is known as a “special measures direction”. The clause also includes further requirements that the court must take into account when making a special measures direction such as the views expressed by the witness and whether the use of special measures may inhibit the testing of the evidence.

Clause 7: Child witnesses and live link: test for special measures direction

This clause makes special provision for children who are required to give evidence in civil proceedings. The clause allows a child to give evidence using the special measure of live link, provided that this special measure is likely to maximise the quality of the evidence and the child is not able to opt out of using live link. This clause also allows the court to make a special measures direction permitting a child to use other special measures if those may improve the quality of the child’s evidence.

Clause 8: Child witnesses and live link: opt-outs

This clause affords children the opportunity to opt out of giving evidence by live link if the court is certain that certain protective criteria have been met. If a child opts out of giving evidence by live link, the evidence may be given from behind a screen. A child may also opt out of using a screen if the court is again satisfied that certain protective criteria have been met.

Clause 9: Procedure for special measures direction

This clause provides that a special measures direction can be made either as a result of an application by any party to the proceedings or of the court’s own motion. The clause also makes provision relating to the duration of a special measures direction and the procedure for discharge or variation of such a direction.

Clause 10: Availability of facilities for special measures

This clause makes it clear that any witness’s eligibility for special measures is subject to the availability of those facilities in the court. However the clause also makes provision

for the transfer of any proceedings to alternative courts where these facilities would be available.

Clause 11: Screens

This clause provides for screens to be used by an eligible witness when giving evidence.

Clause 12: Evidence by live link

This clause makes provision for an eligible witness to use live link when giving evidence.

Clause 13: Live link: supporters

This clause provides that a supporter approved by the court may accompany an eligible witness whilst evidence is being given by live link.

Clause 14: Removal of wigs and gowns

This clause provides for the removal of wigs and gowns whilst an eligible witness is giving evidence.

Clause 15: Examination of witness through intermediary

This clause provides that an eligible witness can be assisted by an intermediary when giving evidence. The clause also defines the function of an intermediary and makes provision for subordinate legislation to be made which may determine who may act as an intermediary and the conduct and standards expected of them.

Clause 16: Intermediaries: application of law of perjury

This clause ensures that intermediaries are brought within the scope of the provisions of the Perjury (Northern Ireland) Order 1979.

Clause 17: Aids to communication

This clause makes provision for the use of aids to communication for an eligible witness.

Clause 18: Application of provisions on video recording

This clause makes provision for the availability of video recording as a special measure.

Clause 19: Special measure: video recording of evidence in chief

This clause makes provision for the use of video recording as a special measure in certain limited circumstances in civil proceedings, namely in proceedings under the Children (Northern Ireland) Order 1995. Any other evidence given by the child in these circumstances will be given by live link.

Clause 20: Test for giving special measures direction for video recording

This clause makes provision for the test for the use of video recorded evidence. This clause makes provision that in certain proceedings under the Children (Northern Ireland) Order 1995, children may give evidence in chief by way of pre-recorded video evidence if the court considers that, in all the circumstances of case, it is appropriate to do so and it is also in the interests of justice to do so. If the test is not satisfied, children will give evidence in the manner set out in Clause 7.

Clause 21: Video recording and intermediaries

This clause makes provision for the admission of video recorded evidence which was taken with the assistance of an intermediary.

Clause 22: Status of evidence given in accordance with special measures direction

This clause makes provision that any evidence given by a witness whilst using a special measure is to be treated as if the witness had given direct oral testimony in court.

Clause 23: Status of evidence given in accordance with special measures direction: perjury

This clause ensures that witnesses who make a statement on oath in any proceedings which are not judicial proceedings for the purposes of Article 3 of the Perjury (Northern Ireland) Order 1979, but who do so under a special measures direction shall have those proceedings treated as if they were part of judicial proceedings, therefore making them subject to the provisions of the Perjury (Northern Ireland) Order 1979.

Clause 24: Rules of court

This clause makes specific provision for certain rules of court to be made to aid the operation of this Bill.

Clause 25: Savings

This clause contains various savings which are required for the operation of this Bill.

Clause 26: Interpretation of this Part

This clause contains a number of definitions.

Clause 27: Application of this Part

This clause defines the type of civil proceedings which are affected by the provisions in this Bill which relate to the competence of witnesses to give evidence.

Clause 28: Competence of witness to give evidence

This clause makes provision that all witnesses are competent to give evidence. However, this is subject to a number of provisos, namely that a witness must be able to understand any questions that are put to them as a witness and a witness must be able to give answers which can be understood.

Clause 29: Determining competence of witnesses

This clause sets out the procedure by which competence of a witness should be determined.

Clause 30: Determining whether witness to be sworn

This clause makes provision for the tests to be applied to determine whether a witness should give sworn evidence.

Clause 31: Reception of unsworn evidence

This clause makes provision for the tests to be applied to determine whether a witness should give unsworn evidence.

Clause 32: Offence of giving false unsworn evidence

This clause creates a criminal offence for giving false unsworn evidence.

Clause 33: General supplementary provisions

This clause contains various supplementary provisions.

Clause 34: Orders and regulations

This clause contains a general power to make any supplementary, incidental, consequential or transitional provisions or savings.

Clause 35: Interpretation

This clause contains definitions of terms used in this legislation.

Clause 36: Consequential amendments

This clause applies Schedule 1 which contains consequential amendments.

Clause 37: Repeals

This clause applies Schedule 2 which contains repeals.

Clause 38: Short title and commencement

This clause contains provision for the commencement of the legislation, together with its short title.

SCHEDULES**Schedule 1: Minor and consequential amendments**

This schedule contains minor and consequential amendments.

Schedule 2: Repeals

This schedule contains repeals.

FINANCIAL EFFECTS OF THE BILL

It is unlikely that this Bill will be cost-neutral, however the main costs are associated with the provision of resources for facilitating special measures. Since special measures are already provided in criminal proceedings in Northern Ireland, an infra-structure already exists which can be built on if it emerges that a roll-out of special measures for civil proceedings creates extra demand for facilities.

HUMAN RIGHTS ISSUES

The Bill is in compliance with Convention Rights.

EQUALITY IMPACT ASSESSMENT

The impact of the Bill on equality of opportunity has been considered, and was the subject of consultation with a wide range of interested individuals, organisations and professions, the results of which have been taken into account in finalising the Bill. Any impacts identified are minor in nature and entirely positive in effect.

SUMMARY OF REGULATORY IMPACT ASSESSMENT

The effects of this Bill have been assessed and it is concluded that the provisions will not result in savings for or costs to businesses, charities, social economy exercises or voluntary bodies.

LIST OF CONSULTEES WHO PROVIDED RESPONSES TO THE CONSULTATION PAPER

Office of the Lord Chief Justice of Northern Ireland

District Judge AE Wells

Northern Ireland Judicial Appointments Commission

Limavady Borough Council

Personal Injuries Bar Association of the Bar Council

Equality Commission for Northern Ireland

Probation Board for Northern Ireland

National Society for the Prevention of Cruelty to Children

Law Centre (NI)

Disability Action

Children's Law Centre

Victim Support NI

Women's Aid Federation Northern Ireland

Training for Women Network

Northern Ireland Ombudsman

Committee on the Administration of Justice

Alliance Party

Jim Nicholson MEP (Ulster Unionist Party)

Janique Burden (Children's Service Manager, Young Witness Service, National Society for the Prevention of Cruelty to Children)

Include Youth (Young Voices Programme):

Mat Crozier (Young Voices Coordinator)

Leighton Gillard

Gail McKee

Steven McPoland

Liam Quigley

National Children's Bureau (NI)

Gill Hassard (Participation Officer)

Chloe Boyd

Lucy Martin

Robert Martin

Paul McKnight

Steven McNeil

Jordan Murphy

Linum Chambers
2 Bedford Square
Bedford Street
Belfast BT2 7ES

T : +44 (0) 28 9054 4860

E : info@nilawcommission.gov.uk

W : www.nilawcommission.gov.uk



Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, telephone, fax and email

TSO

PO Box 29, Norwich NR3 1GN

Telephone orders/general enquiries: 0870 600 5522

Order through the Parliamentary Hotline Lo-Call 0845 7 023474

Fax orders: 0870 600 5533

Email: customer.services@tso.co.uk

Textphone: 0870 240 3701

TSO@Blackwell and other accredited agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

Telephone orders/general enquiries: 028 9023 8451

Fax orders: 028 9023 5401



This book was produced using recycled paper

ISBN 978-0-337-09737-9



9 780337 097379